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THE

NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY

FRANCIS NEWARK,

BARRISTER-AT-LAW

1960

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Lords Justices of Appeal:

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THE RIGHT HON. LANCELOT ERNEST CURRAN.

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THE HON. HERBERT ANDREW MCVEIGH.

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ERRATUM

Page 16, line 18 should read—"*Corporation v. Pearce and Pugh*[2] "that an application to develop meant an application to carry "out in."

CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

REGINA (ANTRIM COUNTY COUNCIL) v. MINISTRY OF HEALTH AND LOCAL GOVERNMENT[1]

Planning Acts—Interim development—Change of user—Interim development application made after change of user effected—Whether application valid—Power to make order prohibiting user pending appeal from refusal of interim development application—Planning (Interim Development) Act (Northern Ireland), 1944 *c.* 3, *ss.* 2, 4, 9(1).

The occupier of a dwelling-house made an interim development application under the Planning (Interim Development) Act (Northern Ireland), 1944, for permission to use the premises as a shop. He had begun to use the premises as a shop before the date of application and continued to do so thereafter, and when this fact came to the knowledge of the local authority they made an order prohibiting the use of the premises as a shop, but no formal notice was sent to the occupier that his interim development application had been refused, as the local authority had at all times taken the view that no such application could be entertained in a case where the development had already been carried out. By section 2(5) of the Act of 1944 an interim development application is (subject to certain exceptions not material to this case) deemed to be refused after the lapse of two months from the receipt thereof.

After the lapse of two months from the date of his application the occupier appealed to the Ministry against the local authority's refusal under the provisions of section 2(6) of the Act of 1944. The local authority took the view that there had been no valid interim development application and that accordingly the Ministry had no jurisdiction to hear the appeal, and they therefore applied for and obtained from the Queen's Bench Division a

[1] In the Queen's Bench Division before Lord MacDermott L.C.J. and McVeigh J.: Oct. 30, Nov. 6, Dec. 18, 1957.

In the Court of Appeal before Black and Curran L.JJ. and Sheil J.: Feb. 17, 18, 19, 20, 1958: May 29, 1959.

conditional order for a writ of prohibition directed to the Ministry to prohibit the Ministry from hearing or determining the appeal.

On the hearing of the application to make the conditional order absolute notwithstanding cause shown the Divisional Court (Lord MacDermott L.C.J. and McVeigh J.) was divided in opinion, and accordingly the conditional order was discharged.

On appeal to the Court of Appeal, *held*, (i) that in the Act of 1944 "development" by way of change of user is defined as any use of land or any building thereon for a purpose which is different from the purpose for which the land or building was last being used, and not as the making of a change in the use of the land or building; that each day's use for a new purpose was therefore "development"; and that even if an interim development application could be made only in respect of prospective development, the use of land for the new purpose in the future was such a "development" as could properly be made the subject of an interim development application;

(ii) that, accordingly, in the present case the occupier's application was a valid application, and that therefore the conditional order was rightly discharged.

Held, further, affirming the decision of the Divisional Court on this point, that in a case where a valid interim development application has been made, the interim development authority has no jurisdiction under section 4 of the Act of 1944 to prohibit the user which is the subject of the application pending the final determination of the application.

Semble from the judgments of the members of the Divisional Court, that when an interim development authority proposes to make an order prohibiting the user of land under section 4 of the Act of 1944, the authority must explicitly resolve that they are satisfied that such an order is necessary and expedient having regard to the provisions then proposed to be included in the planning scheme, and that it is not sufficient that the authority should merely resolve to make an order under the section.

APPLICATION to make absolute a conditional order of prohibition.

James McCormick of Glynn, County Antrim, was the occupier of a dwelling-house which had for many years up to November 1956 been used solely as a dwelling-house and for no other purpose. In November 1956 he opened a shop in part of this dwelling-house and equipped it for the sale to the public of groceries, tobacco, confectionery and ice-cream. No application to convert the premises or to use them for this purpose was made to the appropriate planning authority, the Antrim County Council.

On November 27, 1956, following a visit of the deputy planning officer to the premises, Mr. McCormick wrote to the Antrim County Council asking for permission to use the premises as a shop. The County Council on consideration of the matter decided that a notice under the Planning (Interim Development) Act (Northern Ireland), 1944, should be served on Mr. McCormick of intention to prohibit

him from using the premises as a shop, and such a notice, dated December 27, 1956, was duly served upon him. By notice dated January 18, 1957, Mr. McCormick appealed pursuant to section 4(2) of the Act of 1944 to a court of summary jurisdiction sitting at Larne against the action which the County Council proposed to take, and on the same day he wrote to the County Council stating that he intended to apply for permission to use the premises for the purposes of a shop. The County Council replied saying that it was the view of the Council that no application could be considered where development had been carried out before the application had been submitted.

On January 22, 1957, Mr. McCormick formally applied for permission to use the premises as a shop, but to this application the Council replied that they could not treat the application as a proper one having regard to the fact that the development was carried out without permission before an application had been made. It was agreed that the pending appeal to the court of summary jurisdiction should be adjourned for two months.

On March 11, 1957, Mr. McCormick's solicitor wrote to the solicitor to the County Council stating that the appeal to the court of summary jurisdiction was being withdrawn and that Mr. McCormick had ceased to use the premises as a shop, and he went on to apply for permission to use the premises as a shop. The instructions given by Mr. McCormick to his solicitor that he had ceased to use the premises as a shop were not true, and the premises continued to be so used. A planning officer visited the premises later in March and discovered this fact.

No reply was sent by the County Council or its solicitor to the application of March 11, 1957, but on April 30, 1957, the Council decided to make a prohibition order under section 4 of the Act of 1944, and this prohibition order was served on Mr. McCormick the same day.

On May 16, 1957, Mr. McCormick appealed to the Ministry of Health and Local Government against the refusal of the Council to grant his application of March 11, 1957. Correspondence then took place between the Ministry and the Council and the Council's solicitor in which the Council took the view that the Ministry had no jurisdiction to hear the appeal. The Ministry took the contrary view and fixed a hearing of the appeal before the Ministry's inspector for September 2, 1957. At the hearing on that date the County Council again objected to the jurisdiction of the Ministry to entertain the appeal, and the appeal was eventually adjourned in order to enable

the County Council to test the matter in the High Court. The County Council accordingly applied for a writ of prohibition to prohibit the Ministry from hearing or determining the appeal.

Harrison Q.C. and *Watt* for the County Council.
Nicholson Q.C. and *McConnell* for the Ministry.

Cur. adv. vult.

LORD MACDERMOTT L.C.J.: In these proceedings the Antrim County Council, as interim development authority for County Antrim, seek to prevent the Ministry of Health and Local Government from hearing what purports to be an appeal by one James McCormick under section 2(6) of the Planning (Interim Development) Act (Northern Ireland), 1944, against the refusal of his application for permission to develop his dwelling-house in Glynn, County Antrim, by using part thereof as a shop.

For the purposes of the first part of this judgment the material facts may be stated quite shortly. On March 11, 1957, Mr. McCormick's solicitors wrote to the Council asking permission to use the said premises as a shop. The letter enclosed a site plan in triplicate and there is no question that, in point of form, it sufficed as an application for permission for interim development. It is common ground that the user of the applicant's premises as a shop would constitute a "development" within the meaning of section 9(1) of the Act of 1944.

Before and at the time of making this application Mr. McCormick was, according to the Council, and as we must assume for the purposes of these proceedings, using his premises as a shop. This was reported to the Council which took the view that the letter of March 11 could not be treated as an application for interim development permission on the ground that, as the Council had decided earlier, an application for permission could not properly be made when the development in question had already been carried out. No formal rejection of the application was sent to Mr. McCormick or his solicitors. Instead, the Council on April 30 resolved to prohibit the use of the premises as a shop under the enforcement provisions of section 4 of the Act of 1944. By subsection (5) of section 2 of that Act an interim development application shall be deemed to be refused when two months have elapsed from the receipt thereof if, as is the case here, the development authority does not take any of the steps mentioned in the subsection within that period. Shortly after the expiration of the two months Mr. McCormick appealed to the

Ministry under subsection (6) of section 2 from the refusal of his application of March 11. The Council challenged the jurisdiction of the Ministry to entertain the appeal on the basis that there had been no competent application for permission and therefore no refusal of an application such as could be appealed from under subsection (6). Thus arose the first and principal question which we were asked to decide. As framed by Mr. Harrison for the Council it is in these terms: "Can there be a valid interim development application under "the Act of 1944 for a change of user after that change has in fact "taken place?" I have come to the conclusion that this question should be answered in the affirmative. The reasons which, in their combined effect, seem to me to justify this view may be enumerated as follows:

(1) It is open on the language of the Act. Section 2(2) provides that "an interim development order.... may empower any local "authority specified in the order to permit the development of land "in accordance with the provisions of this section". There is nothing in that to restrict the power of permission to development that has not been started, and nowhere else in the Act or in the Planning (General Interim Development) Order (Northern Ireland), 1944, made thereunder, (S. R. & O. 1944, No. 58) is there any provision that shows a clear intention to preclude applications for permission in respect of what has already been done. Mr. Harrison relied upon several expressions as showing the contrary by implication. His argument on the text was perhaps at its height in relation to section 2(4) which empowers an interim development authority to postpone consideration of a development application "unless the applicant "shows to their satisfaction that the proposed development would be "carried out immediately if the application were granted". That certainly contemplates a development that has yet to take place: but the description is only of that particular type of development which will prevent the operation of the subsection, and I see no ground for concluding from that that all other types of development capable of being the subject of an application for permission must also lie in the future. They might, indeed, all be regarded as "proposed" developments, but "proposed" does not necessarily connote futurity. It may mean as well "put forward for acceptance or consent". Reference was also made, for the same purpose, to article 10 of the Order of 1944. That article provides that any person who desires to apply for permission for interim development is to apply in writing and to furnish in triplicate a site plan and particulars "illustrated by

"plans and drawings in triplicate, sufficient to show the proposed "development". This, too, it was said, was the language of futurity and not such as would be used could permission be sought for a development that had already been effected. The broad nature of the right to apply for interim development permission must, I think, be found in the Act rather than in the Order; but apart from that consideration, the word "proposed" in this article is also capable of being interpreted in the manner already mentioned, namely, as meaning "put forward for acceptance or consent". The reference to plans and drawings in the immediate context lends plausibility to the suggestion of an element of futurity; for those are things commonly thought of in relation to what is projected, though, of course, they can also exist to show what has been accomplished. But, as the proviso which follows the words I have quoted from article 10 makes plain, this article cannot be restricted to applications in respect of new structures and is clearly referable also to instances involving nothing but a change of user. In such instances a description of the "proposed" user and a site plan (in triplicate) will satisfy article 10, and that requirement does not seem to me to point necessarily to the "pro- "posed" user being a user which is new in the sense that it has yet to be practised on the premises in question.

(2) But even if I am wrong about the meaning of "proposed", and the word is to be read as connoting futurity and so that, in relation to structures, it signifies structures which have still to be erected at the time of the application, it does not follow that permission cannot be sought in respect of a user of a kind that has already taken place. User is a day to day activity. Unlike a completed physical development, it may stop and start; and just as one can speak aptly, regarding the future, of a "proposed" user irrespective of whether or not the same use is presently being made of the premises, so one may seek permission for a "proposed" user even though that user is already being practised. "Proposed" as respects building will, on this view of the meaning of the word, exclude a reference to buildings in existence; but the position as respects user simpliciter seems to me entirely different. Take the case of a professional man who wants to use part of his residence for professional purposes. He hears of the Act of 1944 and writes to his interim development authority saying: "In "future I propose to use, for the purposes of my profession, the "room in my dwelling which is marked 'X' on the site plan of which "three copies are enclosed. Please let me have your permission". Provided the particulars were sufficient that would be a valid application for permission. But suppose the same gentleman only

gets to know of the 1944 Act after he has put the room to use for professional purposes, and that he then writes to the authority in the terms I have set out with an additional sentence at the end reading: "I am already using this room for these purposes and am sorry I did "not seek permission earlier, but I was unaware of the provisions of "the Act of 1944". That, according to the Council, would not be a valid application. I am unable to agree. Each application is appropriate in its terms and one seems to be as much within the Act as the other.

(3) Subsection (6) of section 4 of the Act of 1944 supports the conclusion reached. This subsection provides that "where permission "for any development of land has been granted.... for a limited "period only, and that period expires before the planning scheme "comes into operation, the provisions of this section"—that is the provisions for enforcement—"shall, after the expiration of that "period, apply in relation to the development as if no such per- "mission had been granted and as if the development had been "carried out at the expiration of the said period by the person then "entitled to possession of the land". Now, I can find nothing in the Act to debar an owner or occupier from asking for development permission in respect of the period commencing after the limited period had expired, and Mr. Harrison, indeed, conceded that such an application could be made before, though not after, the end of the limited period. But that means an application being made at a time when the development for which permission is being sought has, in fact, already been carried out: and if that is possible in one case there seems to be no good reason why it should not be possible in others, or why valid applications for permission should be restricted elsewhere to developments that have still to take place. Where an application for the extension of the limited period is made what is the "proposed development"? It is surely the development proposed for permission. It cannot be a development proposed to be carried out at a future date. But Mr. Harrison drew a distinction between applications made before and after the expiration of the limited period: if the former was good, the latter was as clearly bad, he said, because it sought permission for what was then without permission and therefore open to enforcement proceedings. That leads me to my next reason.

(4) There is nothing in the Act to prohibit development without permission or to make such development in any way unlawful per se.

If there were, it might be argued—with what success I need not now inquire—that Parliament would not have intended to provide for the validation of what was contrary to law. The scheme of this legislation, however, seems to have kept deliberately away from making unauthorised development unlawful. No doubt such development becomes vulnerable, in certain circumstances, to enforcement proceedings under section 4. But that is another matter and is, in my opinion, far short of enough to justify the view that Parliament intended to penalise the person who developed without permission by making it impossible for him ever to obtain permission thereafter, on the merits, for what he had done or was doing. If an owner has engaged in some lawful activity on his land, it is very difficult to understand why the interim development authority should be given power to forbid that activity without the owner having any right to an investigation of the merits. An appeal to a court of summary jurisdiction under subsection (2) of section 4 certainly does not confer that right: see *Swindon Corporation v. Pearce and Pugh*[1].

(5) As the Council's contention is not necessary for the due functioning of the Act and could lead to grave hardship, it should be rejected in favour of the view, also open on the language of the enactment, that a valid application can be made in respect of an existing and unauthorised development. There can, I think, be no doubt that this contention is not in any way essential to the working of the legislation. If permission ought to be granted on the merits to an applicant who has developed first and sought approval afterwards, it cannot injure or impair the purposes of this statute to grant it; and if it ought to be refused on the merits, what harm can come of having first investigated the application for permission in order to reach a fair conclusion? This view finds support in section 18 of the English Town and Country Planning Act, 1947, under which an application for permission may be made after the development has taken place, for though that Act differs in matters of detail and procedure from the Northern Ireland Planning Acts of 1931 and 1944, its substance and its general policy are sufficiently similar to bear comparison for this purpose.

Nor can there be any doubt as to the hardship which the Council's view may entail. The circumstances of a development within the meaning of the very wide definition contained in section 9 of the Act of 1944 might well be such as to make a failure to secure prior permission nothing more than a matter of pure inadvertence. Yet, if the

[1] [1948] 2 K.B. 301.

Council are right, there can be no subsequent grant of permission and no security against an order which may involve the owner in serious loss. Parliament has placed very drastic powers in the hands of development authorities, but I do not think it has gone the length for which the Council contend and I can see no reason why it should have done so.

Being of opinion that the first question should be answered adversely to the Council for the reasons I have just given, it now becomes necessary to consider the consequences of that answer. On this aspect of the case Mr. Harrison asked the court to consider the following question: "If so"—that is, if the first question is answered in the affirmative—"can there be a valid appeal under section 2 of the "1944 Act after a prohibition order has been made and is in force "under the Act?" Where a prohibition order has been duly made under section 4 of the 1944 Act and has become effective, either by not being appealed against or by having been confirmed on appeal, it would seem that an application for permission which is made thereafter will be too late and that any appeal from an actual or implied refusal of such application will also be too late. When a prohibition order has become fully effective the situation is so materially changed that permission as envisaged by the Act is no longer possible. The right to maintain the development objected to has ceased, and by section 4(5) the continuance of the prohibited user is an offence.

But if permission has been sought before a prohibition order has become effective, I incline to the view that, as a matter of implication, the enforcement procedure must depend upon and await the expiration of the time limited for an appeal against a refusal of permission and the outcome of any appeal that may be taken. Otherwise, a successful appeal, which by section 2(6) means that the Ministry's decision is to have effect as if it were a decision of the interim development authority, would put that authority in the impossible position of being able to enforce an order based on a decision that had since been reversed. In *Davis v. Miller*[1] a Divisional Court in England held that the pendency of an appeal did not operate to stay enforcement proceedings under section 23(1) of the English Act of 1947. But the facts of that case were unusual, and as the decision related to a different statutory procedure from that which pertains in Northern Ireland I am not disposed to regard it as an authority in point here. As I have indicated, the pendency of a

[1] [1956] 3 All E.R. 109.

valid appeal under the Act of 1944 means that the interim development authority's decision, on the strength of which the enforcement procedure has been initiated, may become so changed as to be incapable of supporting that procedure; and so long as this remains a possibility I cannot impute to the Legislature an intention which would permit of the enforcement proceedings being brought to a final conclusion.

I have expressed my views on these points as we were invited to do so. But in the present case I think they are really academic as I have come to the conclusion that the Council have not made any valid or effective prohibition order and, accordingly, that the second question does not arise.

As I read section 4 of the Act of 1944 and the Schedule thereto, the first step that a development authority has to take to enforce development control is to be satisfied not only of the fact of an unauthorised development, but also "that it is necessary or expedient" to take action under paragraphs (a) or (b) of subsection (1) "having regard "to the provisions then proposed to be included in the planning "scheme". This means that the Council, as a preliminary, had to direct themselves to the necessity or expediency of the action in mind and to what was then proposed to be done in the future. In the ordinary course the way of proving that first step would be for the Council to resolve accordingly. It may well be that the necessary proof should also include whatever is needed to show that proposals for inclusion in the planning scheme were then in existence. I do not need to decide that, but it would, at least, be proper that that should be shown as it is clear that section 4 cannot operate, so to speak, in the air and without proposals having been made for the future scheme. The next step is dictated by subsection (2) and the Schedule. Under paragraph 1 of the latter, the authority must give a 28 days' notice "specifying the nature of, and the grounds upon which they "propose to take" action under section 4. It was submitted by Mr. Harrison on behalf of the Council that "action under section 4" covered everything done under that section and, therefore, that the due order of events was the notice first and then the resolution. That I cannot accept. It seems to be putting the cart before the horse. "Action" can only be taken under the section when the preliminary determination to which I have already referred has been made. The Council have no grounds for taking action until that is done. Giving the notice first does not demonstrate their satisfaction about the matters they must consider before they can do anything affecting the land in question. Under paragraph 3 of the Schedule, the power of

the court of summary jurisdiction to enforce the action proposed to be taken depends upon the court being "satisfied that the interim "development authority are entitled to take the proposed action on "the grounds specified in the notice". That seems to me to indicate clearly that by that time the authority must have resolved in the manner necessary to attract the enforcement powers conferred by section 4 and, further, that the notice, which has to state such grounds, was meant to come after and not before the resolution. See the sequence of events in *Swindon Corporation v. Pearce and Pugh*[1] which case, it will be observed, related to a period before the English Act of 1947 was in operation.

Whether the Council here intended to fashion their procedure on the Act of 1947 or not, there is no question as to what they did. On November 27, 1956, Mr. McCormick wrote to the Council as follows: "I wish to apply for permission to revert my premises at Glynn into a "shop. These premises were built in or about 1919 having shop "attached where a grocery business was carried on for about 20 "years. I also wish to apply for permission to have a car park con- "structed in front of these premises. Would you please inform me if I "have to forward plans for same". The only reply to this letter seems to have been a notice dated December 27, 1956. This undoubtedly was intended as the notice directed to be given by paragraph 1 of the Schedule to the Act of 1944. Then, following a correspondence in the course of which Mr. McCormick's solicitors made the application of March 11, 1957, for development permission, the Council resolved, on April 30, 1957, after a reference to Mr. McCormick using his dwelling as a shop and to the notice of December 27, that "the "County Council as interim development authority, being satisfied "that it is necessary and expedient to do so, having regard to the "provisions proposed to be included in the planning scheme, hereby "make an Order to prohibit the use of the said dwelling-house as a "shop".

For the reasons stated that was, in my opinion, the wrong way to put section 4 into operation. I therefore conclude (i) that there was a valid application for permission, and (ii) that the Ministry has jurisdiction to hear Mr. McCormick's appeal.

I would, accordingly, allow the cause shown and discharge the conditional order.

[1] [1948] 2 K.B. 301.

McVeigh J. after stating the facts continued: The first point for our consideration was put as follows: "Can there be a valid interim "development application under the Act of 1944 for a change of 'user after that change has in fact taken place?" I would answer this question in the negative for the reasons stated below. The consequence of this would be that the order nisi would be made absolute.

Under the Planning (Interim Development) Act (Northern Ireland), 1944, no person is obliged to apply for permission to develop. The position is the same as it had been in England under the Town and Country Planning Acts of 1919, 1925, 1932 and 1943, that is, developers were not under compulsion to make applications for permission to develop to the planning authority. But, if the developer did not apply for permission and by that omission did not enable planning control to be exercised at the stage where it was most effective and least expensive, that is to say, before buildings were erected, or lands or buildings were put to new uses, then I think the position was that such developer took the risk of the planning authority removing such buildings or prohibiting such use. The design and purpose of the Act, although it does not oblige him to apply for permission, does not, to my mind, indicate that the developer can choose to do so after the development has taken place.

The primary purpose of all planning in the sense in which we are using it is, as the preamble to the 1944 Act states, "to secure more "effective control of development", and the development which the Act aims at is new buildings and new uses of land or buildings. One way in which this control might be achieved would be by means of a plan which would provide for control being exercised at an early stage, and not when the development is completed or partially completed. Such control might also provide means to make that control effective, as for example by the provisions of section 4 of the Act of 1944 relating to pulling down buildings or prohibiting uses. I think that this is the plan of the 1944 Act. No doubt the plan is much more precise in the English Town and Country Planning Act, 1947. Under section 18 of that Act there was introduced for the first time in England power to enable permission to be given in respect of development which had already taken place. This was done by enacting that the power to grant permission to develop land includes power to grant permission to retain on land buildings or works constructed on the land before the date of application, or for the continuance of any use of land instituted before that date (whether without permission granted under the Act or in accordance with a permission for a limited period) The note to this section in Halsbury's Statutes of

England, 2nd ed. vol. 25, p. 516, is as follows: "This provision makes "good an omission in the previous law and provides for the legal- "isation of development carried out without permission". The express provision in the Act of 1947 serves to indicate to me that such power may well have been absent from the earlier English Acts and also from the Northern Ireland Act which was modelled on them. It can only be found in them, if at all, by necessary implication. There are provisions in the Act of 1944 which point to the fact that an application to develop means an application to carry out development not yet in existence or to make a new use of land or buildings. For example, the latter part of section 2(2) which provides for certain consultations in respect of an application which requires to be co-ordinated with the plan of an adjoining local authority. It would be strange to think that this would be done after the development had taken place.

Again, section 2(3) allows the planning authority to grant the application for permission to develop unconditionally or *subject to such conditions* as they *think proper to impose*. It does not seem unreasonable to say that the right to impose conditions as to the nature, form and character of development is a right which was intended to be exercised before development and not afterwards, and to argue therefrom that no power exists to permit the retention on land of buildings for which no permission was obtained for an unpermitted use.

Again, section 2(4) which provides for postponement of an application would be of little use where the development had already taken place, and would be meaningless in such a case where it says— "unless the applicant shows to their satisfaction that the proposed "development would be carried out immediately if the application "were granted".

Furthermore, the definition of "interim development application" is "an application made under an interim development order for "permission to develop land", and this takes one to the Planning (Interim Development) Order (Northern Ireland), 1944, (S. R. & O. 1944 No. 58) and in article 10 thereof one finds that applications for development must be accompanied by plans and drawings sufficient to show the proposed development. I find it difficult to think that this has reference to anything but a future development. It does not seem to me to involve any forced meaning to construe "proposed "development" as meaning "intended development" or "the planned

"development". This is in my view more in accord with the usual meaning of the word.

There is also section 4(6) which deals with the situation where development has been permitted for a limited period and provides that when the period runs out the development which had been permitted and taken place will be treated as if no permission had been granted and as if it had been carried out at the expiration of the said period. It appears that in such a case no power is given to authorise the retention of such a building, and that the development then becomes one in respect of which an enforcement notice can be served. In other words, the development then being in existence and being then without permission no application can be made for permission to retain it in existence. I realise that it has been admitted by Mr. Harrison in argument that in such case an application for permission to continue the use could be made before the limited period expires, and if this is correct (and I have expressed my doubts as to its correctness) then it would be an example of being able to make an application for permission when the development is in existence before the date of the application. The position under section 4 is narrow and exceptional and having regard to my own view of it I am not prepared to hold that it overwhelms what I have seen to be the intention of this Act.

This construction of the Act may deserve to be described as one which follows the maxim "prevention is better than cure". This phrase was used by Lord Goddard C.J. in *Mills & Rockleys Ltd. v. Leicester City Council*[1] in relation to a planning matter but not dealing with the point in issue here. The passage in his judgment where the phrase occurs is: "Section 5 of the Act of 1943 in effect "says that where the authority is preparing a scheme (which will "afterwards have to be approved by the Minister before it becomes "finally binding), and an interim order is made, no one is to carry "out the development of land or put land to a particular use in a "manner which is contrary to the provisions of that scheme. In other "words, prevention is better than cure". If planning is to be effectively secured as the preamble to the Act of 1944 intends, and if it is to be secured in a way which causes least expense and hardship to the owner and occupier of land and premises, there would be nothing strange in construing the English Planning Acts prior to 1947 and the Northern Ireland Act of 1944 as if they did not contain the power, now contained in the English Act of 1947, "to grant permission for

[1] [1946] K.B. 315, 318.

"the retention on land of any building or works constructed or "carried out thereon before the date of the application, or for the "continuance of any use of land instituted before that date".

If control of planning is to be effective then it might seem that it would be better that a person should know that there is machinery (with an appeal) to which he can resort in order to ascertain if what he *intends* to do will be permitted. If he elects not to use this machinery then it may well be that he must do so at his own risk, the risk being that his building will be pulled down, or its use prohibited, either of which may involve him in loss. In the case of a use no great hardship will generally ensue because the use can be discontinued until an application for permission is made. Where a building has been erected much greater hardship might occur if it had to be pulled down, and for that very reason it would be much better, in my view, that it should be known, as I think it is generally known, that the only proper thing to do before embarking on building work is to find out if it will be permitted by the planning authority. The decision as to whether a building offends planning control is more easily and more effectively made before money has been expended. The introduction of a power to permit the retention of buildings on land which were erected before the date of the application does not fully meet any hardship involved for, non constat, permission might be refused and the building would have to be pulled down. Under the construction of the Act which I suggest, there is some protection, because, if the building happens to conform to the planning proposals of the authority, then no action need be taken under section 4 by way of enforcement notice, and so there is not, in my view, any ground on the basis of great hardship for resisting such a construction. I am doubtful if the alternative construction would produce any less hardship for if it was found on an application to retain the building that it did not conform with planning proposals then permission would be refused. I feel that to some extent the construction I have adopted is supported by some words of Morris L.J. in *Buckinghamshire C.C. v. Callingham*[1]. This was a case concerned with the validity of an enforcement notice under the Act of 1947, but where the Lord Justice considers the earlier Acts, he says[2]: "This "choice of language was probably employed for the reason that under "the Acts of 1919, 1925 and 1932 developers were not under com- "pulsion of applying for interim development permission; they "merely ran certain risks for the future if they proceeded to develop

[1] [1952] 1 All E.R. 1166. [2] Ibid. 1172.

"without having secured permission". I cannot think that the Lord Justice, when he used these words, considered that the developer could apply for permission to retain the development on the land. On the other hand what he had in mind, in my view, was that the risk to be run was that of having an enforcement notice served. I think the words are apt enough to indicate this, and the gist of the passage conveys that to my mind, particularly where he says[1]: "and "as 'works' were carried out on the land after such resolution", (i.e. to prepare a planning scheme) "and as *no permission for the* "*carrying out* of such works was granted under the General Interim "Development Order of 1933", then they must be deemed to have been carried out in contravention of planning control under section 75 of the 1947 Act. I point to the words underlined, and I hope I do not do an injustice to the Lord Justice, if I take it that they indicate that the permission must be "for the carrying out of works" and not for "works carried out".

Again, Lord Goddard seemed to express the view in *Swindon Corporation v. Pearce and Pugh*[2] that an application to carry out in the future. This case related to whether the justices on enforcement proceedings had power to consider the case on its merits, and the matter fell to be decided under the English Act of 1943. In the course of his judgment Lord Goddard says[3]: "Under that Act, where the "Minister has made a general order in respect of interim develop- "ment, an application for permission to develop the land may be "made to a specified authority, who may grant the application "unconditionally or subject to conditions, or may refuse the appli- "cation. Thereupon the applicant may appeal to the Minister, whose "decision is to be final. Suppose then the applicant, in defiance of that "decision, *proceeds to develop the land* and the authority serve a "notice on him under s. 5 of the Act of 1943 of their intention to make "an order prohibiting that use and directing him to reinstate the "land...." I draw attention to the words underlined.

It is of interest to note that in the case of *Swindon Corporation v. Pearce and Pugh*[2] the Minister of Health, after ascertaining the facts and considering the matter, decided that he had no jurisdiction to determine an appeal under section 10(5) of the 1932 Act because the development, being a user of premises, had already taken place and was still continuing at the date of the appeal. This decision is, of course, in no way binding on this court, but it serves to show the view that was taken, presumably after advice, by the responsible

1 [1952] 1 All E.R. at 1173.
2 [1948] 2 K.B. 301.
3 Ibid. 309.

Minister, of exactly the same point as arises in this case. It was, no doubt, with this kind of background in mind that the Imperial Parliament resolved to enact expressly that an appeal lay in such a case. I appreciate that a different view has been taken by the Ministry here after receiving advice on the matter. I think, however, that in order to bring about the construction of the Act contended for by the Ministry legislation is necessary. It is not for me to say whether such legislation should be enacted but I venture to say that this is not the only point under the Planning Code which could be clarified by a new Act.

The second question which was propounded for us and which is set out in the judgment of the Lord Chief Justice does not, on the view of the case taken by me, fall to be answered. I would, however, wish to say that had I been able to come to the same conclusion on the first question as the Lord Chief Justice I would have concurred with what he says on the second question.

The next matter that was discussed was the procedure to be followed in making a valid enforcement notice. Anything I say on this is obiter. The position as I see it is that section 4 of the Act of 1944 permits the local authority to—

(a) remove or pull down the building work or part thereof;

(b) by "*order*" prohibit that use ("order" presumably means a resolution ordering a person to desist);

(c) where necessary, reinstate the land; or under the proviso,

(d) alter the buildings to conform to the permission.

These are the kinds of action that can be taken under section 4.

An appeal to a court of summary jurisdiction is given under section 4(2) but in order to enable this appeal to take place and thereby to enable a valid order to be made by the court of summary jurisdiction, the local authority must act in accordance with the provisions of the Schedule to the Act. This provides that, before taking any action under section 4, i.e. any of the "actions" above, one of which is "by order prohibit that use", the interim development authority must serve a notice in the prescribed manner on the owner, the occupier and any affected person, specifying the nature of, and the grounds upon which they propose to take that action. Therefore before making the prohibiting order the authority must serve the twenty-eight day notice. This was done.

It would appear sufficient if the planning authority state in this notice the matters indicated in *Swindon Corporation v. Pearce and Pugh*[1]. The present notice corresponds with those requirements. See also *Taylor v. Brighton B.C.*[2]. In both these cases there was in existence, prior to the date of application for permission to develop, a resolution which dealt with what was proposed to be inserted in the ultimate planning scheme. It may be, although this has not been decided so far as I am aware, that the words in section 4(1) of the Act of 1944, viz: "having regard to the provisions then proposed to be "included in the planning scheme", mean that there must be in existence before the date of the application some general or particular resolution containing what is proposed for the planning scheme by which the application can be tested to see whether it conforms or not; or it may be that the very resolution by which the authority decide to act under section 4 is sufficient to show what is "then "proposed" to be included in the planning scheme. That is, so far as this case is concerned the proposal would be in effect a prohibition to the effect that no building will be permitted to be used as a shop on the *site* in question, and this proposal would be shown by a resolution which decided to serve a notice in the terms used here.

For myself, I would like to hear further argument on this point and have the procedure opened to us whereby a local authority progresses towards achieving a scheme. Much of this is contained in the Planning Schemes (Procedure) Regulations (Northern Ireland), 1945. This Order does indicate that the first step towards planning is to prepare a preliminary statement within a specified time from the prescribed date and submit it to the Ministry within a further date. These times can be extended and no doubt have been. It may be that few local authorities have got beyond the stage of preparing a preliminary statement, but it may well be that the procedure has some bearing on the construction of section 4. There is a further point, however, and an important one, and it is this—the authority must be satisfied that it is "necessary and expedient" to do so before taking action under section 4; it may well be that they so satisfied themselves in resolving to serve the notice dated December 27, 1956, that is, a notice which contains a recital that they are so satisfied. The affidavit says by paragraph 4 that the matter was considered by the Council who decided to serve a notice, but there is nothing in the Council's affidavit which states in clear terms that the Council addressed their minds to the recital in the notice that the proposed action was necessary and expedient; indeed, for all the court knows

[1] [1948] 2 K.B. 301.

[2] [1947] K.B. 736.

the draft notice was not before the Council meeting at all. I am of the view that this matter must be expressly resolved by the Council whatever the form of the resolution may be, but it would seem desirable that it should be a clear and definite resolution—see *Swindon Corporation v. Pearce and Pugh*[1]. My view on this is that so far as this court is concerned there is no evidence that the Council resolved that it was necessary and expedient to take the proposed action. This may become material at a later date, but has no bearing on how the first question is to be answered.

I have pointed out earlier that the result of my judgment would be that the order nisi should be made absolute; as, however, the members of this court are not in agreement on the main point in this case I agree that the proper order to make in such circumstances, that is where the court cannot agree to make the order absolute, is to discharge the conditional order: see *Reg. v. Bishop of London*[2]; *Poulton v. Moore*[3].

Conditional order discharged.

The County Council appealed to the Court of Appeal.

Harrison Q.C. and *Watt* for the appellants. The Act of 1944 was intended to prevent development pending the coming into operation of a planning scheme, though it did not prohibit it. A developer is not compelled to apply for permission to develop, but if he develops his land without permission, he takes a risk; see *Mills & Rockleys Ltd. v. Leicester City Council*[4], *Buckingham C.C. v. Callingham*[5]. The scheme was to prevent development without permission, and we submit that the local authority cannot give permission after the development has been carried out, otherwise the scheme would be unworkable.

The English Act of 1947 provided for the first time for permission after development, but the Northern Ireland legislation makes no such provision, and we say that the necessary inference from that is that in Northern Ireland there cannot be permission after development.

The whole phraseology of the Act of 1944 shows that only future development was contemplated as the subject of interim development applications. In particular see section 2(2) relating to development

1 [1948] 2 K.B. 301, 303.
2 [1891] 2 Q.B. 48.
3 [1915] 1 K.B. 400.
4 [1946] K.B. 315.
5 [1952] 1 All E.R. 1166.

subject to conditions and section 2(4), relating to postponement of consideration of applications "unless the applicant shows.... that "the proposed development would be carried out immediately"; and section 4, which derives from section 5 of the English Town and Country Planning (Interim Development) Act of 1943. This section was described by Lord Goddard in *Mills & Rockleys Ltd. v. Leicester City Council*[1] as the "teeth of the Act". It appears that there can be no appeal on the merits against an order made under section 4, whic' might be some reason for leaning against our argument if the alternative construction were open on the wording of the Act, but we say that it is not.

[CURRAN L.J. Do you contend that if an interim development application had been made, the local authority could nevertheless have made a prohibition order?]

Not until the time for appeal from the refusal of the application had elapsed. *Davis v. Miller*[2] would suggest that an enforcement order could be made notwithstanding an appeal to the Ministry, but we do not accept that as authoritative. We would agree that in this case, if the appeal to the Ministry is valid, the prohibition order has nothing to say to the case.

[CURRAN L.J. Your argument is that only future development was contemplated. Was the appellant in this case not applying for permission to use his premises as a shop in the future?]

It is a question of fact, and what we say is that there was only one material user of the premises, namely, as a shop, for this user began before the application was made.

Section 4(6) of the Act would seem to contemplate an application for permission after development in a case where permission had previously been granted for a limited period only, but that is a special case. We would say that in those circumstances, the application could be made during, but not after, the expiration of the limited period. It should be noticed that section 4(6) provides that the section shall apply as if the development had been carried out at the expiration of the limited period.

Article 10 of the Planning (Interim Development) Order, 1944, also indicates that future development was what was in contemplation.

Section 2(6) of the Act of 1944 provides for extension of the time

[1] [1946] K.B. 315, 318.

[2] [1956] 3 All E.R. 109.

for appeals, but there is no provision for late applications for permission to develop.

Nicholson Q.C., *Lowry Q.C.* and *McConnell* for the respondent. No provision for application out of time is to be found in the Act of 1944, because none is necessary in our submission. Permission may be applied for at any time.

The enforcement provisions contained in section 4 of the Act may be put into operation in any case where there is development without permission, and there is no provision in the Act for an appeal on the merits against the making of an enforcement order. We submit that if necessary, the courts would be prepared to read into an Act giving such drastic powers as those conferred by section 4 a provision for some appeal on the merits, but in this case it is not necessary to go as far as that, because, in our submission, a hearing on the merits can be had by way of an interim development application under section 2. It is also to be noted that if it is right to say that an application for permission to develop cannot be made under section 2 after the development has taken place, then if the local authority makes an order under section 4, the developer will be excluded from obtaining compensation; and if the local authority do not make an order under section 4, the development must always remain unauthorised, and subject to the possibility that an order under that section will be made, even when the land has passed into the hands of an innocent purchaser.

There is a fundamental difference between the Act of 1944 and the English Town and Country Planning Act of 1947. Under the latter development without permission was for the first time made unlawful, and that fact explains why section 18 of the Act of 1947 expressly provides for retrospective permission, because without a specific authorisation, local authorities could not have permitted what was unlawful. Under the Act of 1944, however, development without permission is not unlawful, and there is no need for a provision corresponding to section 18 of the English Act. The passage in Halsbury's Laws of England quoted by McVeigh J. refers to the position under the Act of 1947, and the dicta of Lord Goddard C.J. in *Mills & Rockleys Ltd. v. Leicester City Council*[1] were, we submit, too wide. Lord Goddard said "No one is to....", but at that time, there was no prohibition. The prohibition came later, in the 1947 Act,

[1] [1946] 1 K.B. 315, 318.

and with it section 18 to protect the rights of an unauthorised developer.

Another important difference between the two Acts is in the definition of "development". The English Act says, in section 12(1), that development, in relation to use "means the making of a material "change" in the use, while section 9 of the Northern Ireland Act says that development includes "any use of the land or any building "thereon for a purpose which is different from the purpose for which "the land or building was last being used". The use of the word "includes" is significant, for it shows that something not ordinarily comprised in the term "development" is being added to it. The term "use" is used throughout the 1944 Act to connote a continuing process: see sections 2(9), 4(5) and 6(9). We submit, accordingly, that even if it is not possible to apply for permission after development in other cases, it can be done where the development is by user. For this purpose, the meaning of the expression "last being used" may be regarded as (a) a question of fact or (b) referring to the last permitted user, or the last user before the Planning Acts became operative, as the case may be.

The appellants admit that our construction has a good deal in its favour, if it were open on the wording, but they say that it is not open for various reasons. Much has been said as to the intention of the Legislature in this connection, but it is to be noted that that intention must be gathered from the words used: see Craies, Statute Law, 5th ed. p. 64, and the cases there cited. If it is right to say that our construction is open on the wording, then it is no answer to say that the Legislature had in mind future development. The appellants also say that permission after development would make the scheme unworkable, but the English Act provides for such permission, and presumably it is workable. In answer to the argument based on the absence of a provision corresponding to section 18 of the English Act, we say that that section was only inserted in consequence of the change made by section 12(1) of that Act. The argument based on the terms of article 10 of the Planning (Interim Development) Order, 1944, would apply equally to the case of an applicant seeking permission to continue a development at the expiry of a limited period for which permission had previously been granted, which application, it is admitted, might properly be made.

Harrison Q.C. replied.

Cur. adv. vult.

BLACK L.J.: This appeal raises a question as to the proper interpretation and effect of certain provisions of the Planning (Interim Development) Act (Northern Ireland), 1944, an Act to which I shall refer in this judgment as the Act of 1944. In order to understand the point at issue the matters leading up to the litigation may be stated very shortly.

One James McCormick was the occupier of a dwelling-house in the village of Glynn, Co. Antrim. At some time, apparently shortly before the month of November 1956, he began to use part of these premises as a shop for the sale of groceries, tobacco, confectionery and ice cream. For many years immediately prior to the opening of this part of the premises as a shop the entire premises had been used solely as a dwelling-house and for no other purpose. No permission to use the premises as a shop had been sought or obtained by Mr. McCormick from the County Council. After a certain amount of correspondence which may be passed over for the purposes of this appeal, McCormick's solicitors on his behalf applied by a letter dated March 11, 1957, for permission to use as a shop the portion of his premises coloured red on a triplicate plan enclosed with their letter. This application was in form at any rate sufficient to constitute an interim development application under the Act of 1944. Notwithstanding a statement in his letter of March 11, 1957, that McCormick had ceased to use these premises as a shop, the County Council's planning officials found on subsequent dates that he was still continuing to use them as a shop. No formal refusal by the Council of McCormick's application appears to have been sent to McCormick or his solicitors, but it is clear that the Council had always taken the view that it could not properly consider a development application in any case where the development had been carried out before the application was submitted. By resolution dated April 30, 1957, the County Council, presumably under the provisions of section 4(1) of the Act of 1944, made an order prohibiting the use of McCormick's dwelling-house as a shop. This resolution when communicated to McCormick would seem to amount to an effective refusal of his application of March 11, 1957, but if this is not so, then by virtue of section 2(5) of the Act of 1944 the application would be deemed to be refused at the expiration of two months from its receipt by the Council. In any case by notice dated May 15, 1957, McCormick appealed under the provisions of section 2(6) of the Act of 1944 to the Ministry of Health and Local Government for Northern Ireland against the Council's refusal of his application. A short

correspondence then took place between the Ministry on the one hand and the County Council and the Council's solicitor on the other hand in which the Council contended that the Ministry had in the circumstances no jurisdiction to hear McCormick's appeal. The Ministry however took the contrary view and fixed a hearing of the appeal before the Ministry's Inspector for September 2, 1957. At the hearing on that date it was admitted by McCormick's legal representatives that on March 11, 1957, and also before and ever sin e that date, McCormick was using and had never ceased to use the premises for the purposes of a shop. Accordingly objection was made by the County Council to the competence of the Ministry to entertain the appeal and eventually the matter was adjourned to permit the County Council to have the opportunity of applying to the High Court to have this question decided. On September 11, 1957, the County Council obtained a conditional order for the issue of a writ of prohibition prohibiting the Ministry from hearing or determining McCormick's appeal. Cause having been shown by the Ministry, the application to make this conditional order of prohibition absolute came on for hearing before a Divisional Court constituted by Lord MacDermott L.C.J. and McVeigh J. The Lord Chief Justice took the view that the application of March 11, 1957, was a valid development application notwithstanding that McCormick was already using the premises as a shop, and held that the Ministry had jurisdiction to hear his appeal. McVeigh J., however, took the contrary view. In the result, as the court could not agree to make the conditional order absolute, the conditional order was discharged. From this decision the County Council have brought the present appeal.

The questions for this court as formulated by Mr. Harrison on behalf of the County Council are:

1. Whether there can be a valid interim development application under the Act of 1944 for a change of use after that change of use has in fact taken place; and

2. If so, can there be a valid appeal under section 2 of the Act of 1944 after a prohibition order has been made under section 4(1) of the Act?

With regard to the second of these two questions, Mr. Harrison conceded that if the application of March 11, 1957, was a valid interim development application under the Act of 1944 and the appeal to the Ministry of May 15, 1957, was a valid appeal, the prohibition order of April 30, 1957, could not be enforced pending the determination of the appeal. This indeed would seem clear upon the

scheme of the Act. It is provided by section 6(2) that the decision on an appeal to the Ministry shall be final and have effect as if it were a decision of the interim development authority. If the legal position is that on the true interpretation of the Act an interim development application which the local authority are bound to consider can validly be made in circumstances such as those of the present case, it would be an impossible situation if the local authority could put into operation the drastic powers conferred by section 4(1) of the Act while an appeal to the Ministry was pending, an appeal which might conceivably result in a decision granting the interim development application. Accordingly, the one real question to be determined by this court is whether after a change of user of premises has taken place a valid interim development application under the Act of 1944 can be made to the local authority to permit the new user of the premises.

The Act itself contains no explicit provision dealing with this point. There is nothing in the Act similar to section 18(1) of the English Town and Country Planning Act of 1947 which specifically provides that the power to grant permission to develop land shall include power to grant permission for the retention on land of any buildings or works constructed or carried out thereon before the date of the application or for the continuance of any use of land instituted before that date. It was indeed sought by the County Council to rely on the insertion of this express provision in the Act of 1947 as impliedly negativing the existence of such a power under the earlier English legislation from which the provisions contained in the Northern Ireland Act of 1944 are admittedly derived. This however is a type of argument upon which I feel it is unsafe to rely, and especially in a case such as the present, where as was pointed out in the argument, the English Act of 1947 and the Northern Ireland Act of 1944 are quite differently framed. In the Act of 1944 there is no provision which purports to compel a landowner to obtain planning permission before embarking on development, whereas section 12(1) of the English Act of 1947 expressly provides that permission shall be required in respect of any development of land which is carried out after the appointed day.

That the problem to be solved is not an easy one is sufficiently manifest by the difference in the conclusions arrived at in the closely reasoned judgments delivered in the Queen's Bench Division. And, as was pointed out in his judgment by McVeigh J., the English Ministry of Town and Country Planning upon the similarly worded

provisions of the Town and Country Planning (Interim Development) Act, 1943, took the opposite view to that which has been taken by the Northern Ireland Ministry of Health and Local Government. This appears from the report of *Swindon Corporation v. Pearce and Pugh*[1] where it is stated that on an appeal to the Minister of Town and Country Planning against the refusal by a local authority of permission for a change of user of premises the Minister held that inasmuch as the development had been carried out prior to the application for permission he had no jurisdiction to determine the appeal.

Both of the parties to the present appeal founded themselves in this court upon two broad lines of argument, first upon the inferences which they suggested should be drawn from the general scheme and purpose of the Act of 1944, and in the second place upon such indications as to the intention of the Legislature which, as they contended, emerged from an examination in detail of the provisions of the Act. It was argued by the County Council that viewing the Act as a whole the natural conclusion was that it was the intention of the Legislature that applications for permission to develop should be made before the development took place. For my own part I think that this is the impression which one would naturally get from a first reading of the Act. Even in the absence of such a provision as that contained in section 12(1) of the Act of 1947 one would think that in a statute concerned with planning control and containing provisions regarding the obtaining of permission for development from the local authority the natural course would be to expect such permission to be obtained before the development takes place. On the other hand it was pointed out that if the County Council's contention was correct it would be impossible ever to obtain authority for a development after the development had taken place. In such case the landowner would be entirely at the mercy of the local authority. However innocent or inadvertent the development might have been, and however much money he might have expended upon the development, the landowner would have no remedy against any decision of the local authority however capricious or unreasonable. He would have no right of appeal to the Ministry. And if the local authority chose to make an enforcement order under section 4(1) of the Act of 1944, though he might appeal to a court of summary jurisdiction under section 4(2), yet according to the English decisions that court would have no power to consider or question the merits of the local

[1] [1948] 2 K.B. 301.

authority's decision: *Swindon Corporation v. Pearce and Pugh*[1]. It is naturally contended that in a case where the proper interpretation of statutory provisions is in doubt, the courts should be very slow to accept a construction which would lead to a result such as this. As regards the inference as to the intention of the Legislature to be drawn from a scrutiny of the detailed provisions of the Act both parties to the appeal found themselves able to point to indications which they put forward as favouring the constructions for which they severally contended. But giving due weight to the details relied upon I confess that I felt that the indications which they afforded, with the exception of one which I shall mention presently, were too slight to sustain any clear decision upon the point at issue between the parties.

In endeavouring to determine how the provisions of the Act of 1944 should be applied to the circumstances of the present case I would respectfully venture to quote a short passage from the judgment of the Lord President (Lord Cooper) in the Court of Session in *Arcari v. Dumbartonshire County Council*[2] as laying down what I conceive to be sound principles to be followed in the interpretation of this legislation. Dealing with section 5(1) of the Town and Country Planning (Interim Development) (Scotland) Act, 1943, which corresponds with section 4(1) of our Act of 1944, Lord Cooper says[3]: "In construing the provisions in question the respondents" (i.e. the landowners) "were, in my view, well warranted in asking us to give "full weight to every word used, and *in dubio* to prefer a strict "construction in favour of freedom; for it is manifest that the section "makes a tremendous inroad upon the liberty of all owners and "occupiers of property, by restricting their right to use and develop "their property as they wish and by subjecting them to heavy "penalties if they fail to conform to the requirements of an authority". Approaching the Act of 1944 with this principle in mind of giving full weight to every word used we find that in section 9(1) "develop-"ment", where used in the Act in relation to land, is defined as including (a) any building operations or rebuilding operations, and (b) any use of the land or any building thereon for a purpose which is different from the purpose for which the land or building was last being used. This definition is significantly different from the definition in the subsequent English Act of 1947 which in section 12(1) defines the meaning of the expression "development" as (a) the carrying out

1 [1948] 2 K.B. 301.
2 1948 S.C. 394.
3 Ibid. 397.

of building, engineering, mining or other operations in, on, over or under land, or (b) the making of any material change in the use of any buildings or other land. So that in "use" cases according to the English statute the development means the making of the change of use, whereas according to our Act of 1944 the development is not the making of the change of use but means the new use which follows upon that change and will describe that new use so long as it continues. This distinction between change of use and the new use supervening upon the change is not a fanciful one. It is clearly pointed out by Hallett J. in *Cole v. Somerset County Council*[1]. Dealing there with section 12(2) of the Act of 1947 Hallett J. says[2]: "I should like to "emphasize what I think is the necessary distinction for present "purposes between development and use. What we have been con- "sidering is whether a development is permitted and not whether a "use after development is permitted.... It seems to me that develop- "ment is something that is done, and when it has been done the "question of what has been brought into existence by the develop- "ment arises". This is undoubtedly the position under the definition in the English Act of 1947. But as I have indicated it is not the position under the definition in the Act of 1944. The definition in the Act of 1944 follows that in section 53 of the English Town and Country Planning Act, 1932. I think we may assume that the alteration in the definition of the term "development" in the Act of 1947 was not a mere drafting one but was deliberately made for the purpose (so far as "use" cases are concerned) of altering the concept of development by making the term "development" mean henceforward the making of a change of use instead of meaning, as it did previously, the actual use itself subsequent to the change.

If this reasoning is sound then after a change of use the future use of the premises for the new purpose will still amount to "develop- "ment" within the definition of that term in section 9(1) of the Act of 1944. To-morrow's use of the premises for the new purpose will still be development although the change of use may have taken place months ago. And so even if the County Council's argument is sound that under the scheme of the Act permission can only be granted for future development and not for development which has already taken place, I see no reason why an interim development application under the Act should not be made for the development which will be constituted by to-morrow's use. In my opinion therefore the order appealed from should be affirmed.

[1] [1957] 1 Q.B. 23. [2] Ibid. 29.

Before leaving the case there are one or two observations I should like to make. In the first place I would emphasize that in this judgment I have addressed myself solely to the position where "development" consists of a new use of land. I have not sought to deal with the position where development consists of building operations. The problem of whether an interim development application in respect of building operations can be made after those operations have been commenced may conceivably arise for discussion in some future case and nothing which I have said is to be taken as indicating any view on the matter. In the second place I observe that there appears to have been considerable discussion in the court below on the procedure to be followed before a local authority can put into operation the powers conferred by section 4 of the Act of 1944. I have not attempted to deal with this question in this judgment since it does not appear to me really to arise on the present appeal. But as the matter is one of very considerable importance I would venture to call the attention of planning authorities, and indeed of everyone connected with or affected by planning, to the judgments delivered in the Court of Session in the case of *Arcari v. Dumbartonshire County Council*[1] to which I have already referred.

CURRAN L.J.: The able arguments of counsel for both parties, and the reasons given by the members of the Divisional Court for their different conclusions, demonstrate how difficult it is to interpret the relevant provisions of the Planning (Interim Development) Act (Northern Ireland), 1944, and point to the desirability of clarifying legislation. I do not propose to refer in detail to the contentions of counsel or the reasons contained in the judgments delivered in the Divisional Court. I do wish, however, to acknowledge the considerable assistance I have derived from them in arriving at what I consider to be the right interpretation of the Act in question.

Certain premises in the village of Glynn, County Antrim, which had previously been used as a dwelling-house and shop, were, at the date of the passing of the Act, used solely as a dwelling-house. The occupier, Mr. James McCormick, recently opened a shop in part of the dwelling-house without having obtained permission from the planning authority, the Antrim County Council. There is no question that such a change in the purpose for which the premises were being used constituted "development" within the meaning of section 9(1) of the Act. Following a visit by the deputy county planning officer,

[1] 1948 S.C. 394.

Mr. McCormick by letter dated November 27, 1956, notified the Antrim County Council that he wished to apply for permission to revert his said premises into a shop, and to have a car-park constructed in front of the premises. He further inquired whether he had to forward plans. That letter was not acknowledged. Instead, a notice dated December 27, 1956, was sent to Mr. McCormick. It recited that he had carried out a development of his said lands otherwise than in accordance with the Interim Development Order made in pursuance of the Planning Acts, or of permission granted thereunder, by using part of his said dwelling-house as a shop, and notified him that after the expiration of 28 days the said use would be prohibited. Mr. McCormick's solicitors by letter dated January 18, 1957, informed the Antrim County Council that they had served notice of appeal, and that they were having plans prepared for submission to the planning authority with an application for permission for the use of the premises as a grocery, tobacconist's, confectionery and ice cream shop. By letter dated January 21, 1957, the Antrim County Council pointed out that they had always taken the view that the Council could not properly consider an application for development in any case where the development had been carried out before the application was submitted. By letter dated January 22, 1957, Mr. McCormick's solicitors applied for permission to use his premises as a shop, and enclosed plans. The letter stated that the property in question was rated in the rate books as house, shop, offices and garden. This letter was returned by the Antrim County Council by letter dated February 7, 1957, stating that, as the development was carried out without permission and before an application was submitted, the Antrim County Council could not treat the matter as a proper interim development application. They agreed to McCormick's appeal against the proposed prohibition order being adjourned for two months. By letter dated March 11, 1957, McCormick's solicitors informed the Antrim County Council that he had now ceased using his premises as a shop and applied for permission to use portion of the premises as a shop. The letter also notified the Antrim County Council that notice of appeal against the making of a prohibition order was withdrawn. Both parties agree that the statement that McCormick had ceased to use the premises as a shop was untrue.

On April 30, 1957, the Antrim County Council resolved to make an order to prohibit the use of the said dwelling-house as a shop.

By notice dated May 15, 1957, McCormick appealed to the Ministry of Health and Local Government against the refusal of the

Antrim County Council to consent to his interim development application of March 11, 1957. The Ministry was prepared to hear the appeal, and gave notice that it would be heard on Monday, September 2, 1957. In the present proceedings the Antrim County Council are asking that a writ of prohibition do issue, directed to the Ministry, prohibiting it from hearing or determining the said appeal. The grounds upon which the right to hear or determine the appeal is challenged are that McCormick developed his land by using part of his dwelling-house premises as a shop; that he did so without obtaining permission from the planning authority, namely, the Antrim County Council; that his subsequent application for permission was not valid, as it was seeking permission for a development that had already taken place. When he applied, say counsel for the Antrim County Council, he was seeking permission to use the premises for the purpose of a shop, but inasmuch as he was already using them for the purpose of a shop, and as that was the purpose for which the premises were last being used prior to the application, the permission he sought was not for "development" within the meaning of section 9(1) of the 1944 Act, but was to have a prior unpermitted development turned into a permitted development, and the Antrim County Council had no power to consider such an application.

Counsel for the Ministry contend for a contrary view. They say that there is nothing in the Planning Acts to prevent permission being given for the continuance of an existing development. But that, even if they are wrong in that contention, this is a case of development by use; that a continuous use constitutes one and the same development; and that permission for use as from the date of the granting of permission is permission for development within the meaning of section 9(1) of the 1944 Act; and that the purpose for which the premises were last being used, within the meaning of that subsection, was the purpose of a dwelling-house; otherwise "any use" after the first day's use would not be a "development", because it would not be for a purpose different from the purpose of the previous day's use.

The first thing that strikes me is that the Antrim County Council have placed themselves in a dilemma. On the one hand they are prohibiting the use of the premises as a shop on the ground that such use constitutes development; on the other hand they are refusing to consider an application for permission for such use on the ground that it does not constitute development. In the one case they recognise that the use is "for a purpose which is different from the purpose for "which land or building was last being used"; in the other they are

contending that the use for which permission is sought is not for a different purpose. Putting it another way, to find the purpose for which the premises were last being used, within the meaning of section 9(1), the Antrim County Council in their prohibition proceedings look to the period immediately preceding the commencement of the use for the purpose of a shop; but in considering McCormick's application for permission to use the premises as a shop they look for the same purpose, to the use immediately preceding the application for permission. It must be borne in mind that the *use* the Antrim County Council is seeking to prohibit—and which must constitute development to enable them to prohibit it—is the *future* use, i.e. the use as from the date of the prohibition order. So in the application for permission it is the *future* use that McCormick is seeking to have permitted, i.e. the same use that the Antrim County Council are seeking to prohibit, on the ground that it constitutes, or would constitute, unpermitted development. To pose the dilemma does not, of course, solve the problem. The Antrim County Council might be wrong in their view that they are entitled to prohibit under section 4(1) (b) of the 1944 Act, and right in their refusal to consider the application for permission to use: or vice versa. In my opinion they cannot be right in both. The validity of the order of prohibition under section 4(1) is challenged on procedural grounds. But it is not in dispute that the Antrim County Council, if they adopt the proper procedure, could prohibit McCormick from using his premises as a shop, subject, of course, to what happens in the matter of his application for permission. In my view the Antrim County Council would have the *power* to prohibit in this case, assuming no permission had been applied for, or if such permission were finally refused. Under section 4(1) (b) of the 1944 Act if any unpermitted development of land is carried out the Antrim County Council may "(b) Where the development consists of any use of the land or any "building thereon, by order prohibit that use and, where necessary, "reinstate the land".

It will be noted that the subsection requires firstly that development should be *carried out*. In the case of development by building operations, it may be said that development is carried out brick by brick, and that the laying of each brick constitutes a pro tanto development. Section 4(1) (a) of the Act of 1944 recognises that the erection of *any part* of a building or work constitutes development. It would be strange, in my view, if this were not so. Now building development may be completed or finalised when the buildings planned have been erected. But in the case of so-called development

by use there is no finality until the use for that particular purpose has finally stopped. Consequently it seems to me reasonably clear that so long as you have the same purpose you have the same development by use; and the development consists of the use, and *any use* for that purpose is not merely part of a development but is itself "develop-"ment". That is precisely what is provided in section (4) (1) (b) of the 1944 Act: "where the development consists of any use. . . ." (the Planning Authority may) "by order prohibit that use", i.e. the use that constitutes the development. It must follow, in my opinion, that in section 9(1) "the purpose for which the land or building was last "being used" must mean in the present case the purpose for which the premises were used before the development by use as a shop commenced. If I am right in this view the unpermitted use of the premises as a shop constituted development, but that does not prevent an application for permission to use as a shop from the date of the permission. When the Antrim County Council say that such an application cannot be made because the last use was as a shop the answer must be, in my opinion, that the last use was not as a shop but as a dwelling-house.

Accordingly I would dismiss the appeal.

SHEIL J.: I accept, as Black L.J. does, the dicta and reasoning of Lord Cooper in *Arcari v. Dumbartonshire County Council*[1] read by the Lord Justice in his judgment, and, that being so, I have refrained from completing a judgment which I had already, in part, prepared and which was to the effect that I thought the writ asked for should go. I have so refrained because on the reading of all the four judgments given in this case I do not feel that I can say the questions propounded can be answered without any degree of doubt.

The delay in delivering judgment in this case is attributable to me for I had carefully to reconsider the whole matter in the light of the observations to which I have referred.

In the result I agree that the appeal should be dismissed.

Appeal dismissed.
Conditional order discharged.

Solicitor for the prosecutor: *Samuel Anderson.*
Solicitor for the respondent: *Chief Crown Solicitor.*

J.P.

1 1948 S.C. 394.

McKAY v. McCLURE AND ANOTHER[1]
PRACTICE NOTE

Practice—Pleading—Action for damages for personal injuries—Osteo-arthritis.

In an action for damages for personal injuries, counsel for the plaintiff, in opening the case to the jury, referred to the fact that the plaintiff had developed osteo-arthritis as a result of the accident. Counsel for the defendants objected that this fact had not been pleaded, and counsel for the plaintiff sought leave to amend the pleadings. Sheil J., expressing the view that osteo-arthritis should always be alleged in the pleadings if it was to form part of the plaintiff's case at the trial, gave leave to amend. Counsel for the defendants then objected that the defendants were taken by surprise and were not in a position to deal with the allegation, and Sheil J. thereupon adjourned the trial and discharged the jury, awarding the defendants the costs of the day.

J.P.

[1] In the Queen's Bench Division before Sheil J.: Sept. 19, 1959.

IN RE G., AN INFANT[1]

Appeal—County court—Refusal of interim adoption order—Whether appeal lies from county court by way of re-hearing—Adoption of Children Act (Northern Ireland), 1950 (c. 6).

An application to the county court for an interim adoption order was refused on the ground that the child's parents had revoked their consent to the adoption. The petitioners sought to bring an appeal by way of re-hearing to the High Court.

Held, that the type of appeal sought to be pursued by the petitioners did not lie, and that the only appeal from a county court in adoption proceedings was on a question of law under section 31(1) of the Adoption of Children Act (Northern Ireland), 1950.

Observations by Black L.J. on the historical development of rights of appeal from county courts in Ireland.

PRELIMINARY OBJECTION IN POINT OF LAW on the hearing of an appeal from a decision of the Deputy Recorder of Belfast.

The petitioners, who had for some time been G.'s foster parents, applied under the Adoption of Children Act (Northern Ireland), 1950, for an interim adoption order. Before the application came before the court the lawful parents withdrew their consent to the adoption. The deputy Recorder held that in the circumstances of the case at least one of the parents was a person whose consent could not be lawfully dispensed with and he dismissed the petition. The petitioners sought to have their application heard on an appeal to the High Court.

Wilson for the appellants.

Shaw for the respondents.

Cur. adv. vult.

BLACK L.J. The appellants in this case seek to prosecute an appeal by way of a full re-hearing by this court against a refusal by the deputy Recorder of Belfast of an application on their part for an interim order for the adoption of an infant under the provisions of the Adoption of Children Act (Northern Ireland), 1950, which I shall refer to in this judgment as "the Act of 1950". The respondents, however, raised at the outset the preliminary point that the type of appeal sought to be pursued by the appellants does not lie. It was agreed by the parties that this contention should be dealt with before any evidence was adduced regarding the substantive matters in

[1] In the High Court of Justice before Black L.J.: Feb. 6, Sept. 18, 1959.

dispute between them and accordingly the preliminary point was argued before me and now falls for decision.

It is of course trite law that the creation of a right of appeal requires legislative authority. An appeal does not lie unless expressly given by statute. As Lord Halsbury said in *Scottish Widows' Fund Life Assurance Society v. Blennerhassett*[1], "If there is an appeal it must be "shown. It is a principle of law that you cannot have an appeal unless "there is either a pre-existing right of appeal at law or a right of "appeal conferred by statute."

Section 31(1) (b) of the Act of 1950 enacts that rules of the Supreme Court may be made providing for an appeal upon a question of law from a county court to the Supreme Court. This is the only mode of appeal from decisions of the county court to be found provided for in the Act of 1950 itself. I do not lose sight of the fact that under section 31(2) (b) of the Act county court rules may make provision for the refusal of any application which the court, having regard to any special circumstances, thinks proper to be dealt with by the Supreme Court. This, however, is not the creation of an appeal from the county court: it is rather a right of the county court to decline to exercise its jurisdiction to make adoption orders in cases which it thinks ought to be dealt with by the Supreme Court. In any event the learned deputy Recorder did not purport in the present case to act under this provision.

The appeal which the appellants in the present proceedings seek to pursue is not an appeal upon a question of law under section 31(1) (b) of the Act of 1950. As I stated at the outset they seek to pursue an appeal by way of a full re-hearing of the application adjudicated upon in the court below. As there is no provision to be found in the Act of 1950 itself for an appeal of this type, the right to bring such an appeal, if such a right exists, must be sought for elsewhere in the statutes providing for the bringing of appeals from decisions of county courts.

Unfortunately there is no one uniform code governing appeals from county courts in Ireland. The different jurisdictions enjoyed by the county courts have grown up in a piecemeal fashion, and the rights of appeal from those different jurisdictions have grown up piecemeal too. For the purposes of the present case the history of the modern county courts in Ireland may be treated as commencing with the Civil Bill Courts (Ireland) Act, 1851. It is to be recollected that at

[1] [1912] A.C. 281, 286.

this date actions upon common law claims, suits in equity, and probate matters were all dealt with by different courts, and practically the only jurisdiction entrusted to the county courts by this Act of 1851 was a limited jurisdiction to deal with matters which would have been cognizable in the courts of common law such as claims for the recovery of debts, claims for damages, ejectments and so forth. Section 127 of this Act of 1851 provided that an appeal by way of re-hearing should lie to the judge of assize from any decree or dismiss made or pronounced in the county court.

Jurisdiction in contentious probate matters was first conferred upon the county court by section 58 of the Probate and Letters of Administration Act (Ireland), 1857. This section was repealed two years later by section 7 of the Court of Probate Act (Ireland), 1859, and section 6 of the latter Act was substituted for it. By section 62 of the Act of 1857 it was provided that any party who should be dissatisfied with the determination of the judge in point of law or upon the admission or rejection of any evidence in any matter or cause under the Act might appeal to the Court of Probate. It is to be noted that this right of appeal is not a right to an appeal by way of a complete re-hearing of the case, but is an appeal solely upon a point of law or in regard to the admission or rejection of evidence. Such an appeal is taken by a case stated by the county court judge and the procedure is now governed by Rules of the Supreme Court, Order 59, rules 29-31.

By Part II of the County Officers and Courts (Ireland) Act, 1877, a limited jurisdiction in a wide range of equity matters was conferred upon county courts in Ireland. By section 43 of this Act it was provided that if any party to a suit or matter in respect of which jurisdiction was conferred by Part II of the Act was dissatisfied with any decree, dismiss, order or direction, made therein he might appeal therefrom to the Lord Chancellor. Under the County Court Act rules made under section 79 of the Act such appeals are to be taken upon the county court judge's notes, but the judge hearing the appeal has jurisdiction to direct evidence to be given upon the appeal either orally or by affidavit of any fact or matters on which he may require further evidence for the purpose of the decision of the appeal: see *Caffrey v. Price*[1].

The next statute to be considered is the County Court Amendment (Ireland) Act, 1882. Section 4 of this Act provided that any person dissatisfied with any decree, dismiss or order pronounced by any

[1] (1897) 31 I.L.T.R. 165.

county court judge in the exercise by him of any jurisdiction at law under the several Acts conferring jurisdiction on county or civil-bill courts in Ireland might appeal therefrom to the judge of assize and further provided that such appeal should be by way of re-hearing. The last sentence, however, of this section enacted that nothing contained in the section should apply to any suit or matter instituted under the equitable jurisdiction vested in the county courts by the Act of 1877. This section 4 of the Act of 1882 is of course the section under which ordinary civil bills are still brought on appeal to the judge of assize, and section 127 of the Act of 1851 which it superseded was repealed by section 9 of the Act of 1882. I shall have to consider the actual wording of section 4 presently.

The next and so far as I am aware the latest statute of a general nature creating a right of appeal by way of re-hearing from county courts (as distinguished from a right of appeal on questions of law or a right of appeal by way of case stated) is the County Court Appeals (Ireland) Act, 1889. By section 3 of that Act it is provided that any party to a suit or matter dissatisfied with any decree, dismiss, direction or order pronounced by a county court judge in the exercise by him of any jurisdiction in equity or probate matters may appeal to the judge of assize.

As will appear from the foregoing résumé of the relevant statutory provisions if there is a right in a case such as the present to have the case re-heard by a judge of the Supreme Court by way of appeal from the county court (as distinguished from an appeal on a question of law or by case stated) such right of appeal must be based either upon section 4 of the County Court Amendment (Ireland) Act, 1882, or upon section 3 of the County Court Appeals (Ireland) Act, 1889. For a variety of reasons the right of appeal given by section 43 of the County Officers and Courts (Ireland) Act, 1877, may be left out of consideration in the present case. Quite apart from the question whether an application under the Act of 1950 is or is not an equity matter—a question which I shall deal with presently—section 43 of the Act of 1877 only gives a right of appeal against orders made in the particular suits or matters in respect of which jurisdiction was given to the county court by Part II of that Act. Moreover, section 43 expressly makes it a statutory requirement to an appeal under that section that the sum of £10 be deposited with the clerk of the peace as security for the costs of the appeal whereas in the present case only £5 was deposited; and in any event the appellants have not sought to lodge in the High Court a copy of the judge's notes as required by

the rules governing appeals under section 43. It is accordingly quite clear that the appellants do not seek to base their appeal upon that section.

I turn now to section 4 of the Act of 1882 and section 3 of the Act of 1889, premising that by virtue of certain statutes, statutory orders and rules of court, which I need not go through in detail, the various jurisdictions conferred upon judges of assize to hear appeals from county courts are exercised in the case of appeals from the Belfast Recorder's Court by judges of the Supreme Court sitting in Belfast. It will be convenient to deal first with section 3 of the Act of 1889 which it will be remembered provides that any party to a suit or matter dissatisfied with any decree, dismiss, direction or order pronounced by a county court judge in the exercise by him of any jurisdiction in equity or probate matters may appeal to the judge of assize. The jurisdiction of a county court judge under the Act of 1950 is not of course a jurisdiction in probate matters. Is it, however, a jurisdiction in equity matters? I do not think it is. Equity matters were matters which fell within the jurisdiction of the old Court of Chancery. But neither the Court of Chancery nor for that matter the common law courts ever exercised any jurisdiction to make orders effecting or authorising adoptions. The jurisdiction of the courts to make adoption orders is entirely the creation of modern Acts of Parliament. It is purely a statutory jurisdiction. It was first introduced into the law of England by the Adoption of Children Act, 1926, and into our law by the Adoption of Children Act (Northern Ireland), 1929. The statute now governing adoption in Northern Ireland is the Act of 1950. In some statutes dealing with specific subject matters there are to be found indications that proceedings under those statutes should be treated as equity matters (see for example Settled Land Act, 1882, section 65(7): Married Women's Property Act, 1882, section 17: Guardianship of Infants Act, 1886, section 10). Thus in *Carpenter v. Carpenter*[1] Kenny J. held that an appeal from the Recorder of Dublin under section 17 of the Married Women's Property Act 1882 was an appeal from the equity jurisdiction of the Recorder. But I am unable to find in the Act of 1950 any indication whatever that proceedings under that Act are to be regarded as equity matters. Section 31 of the Act, which is the section enabling rules to be made regulating the procedure to be followed in applications under the Act, does not convey any direction that such applications are to form part of the equity jurisdiction either of the Supreme Court or of the county court. And it is perhaps worth noting that the correspond-

[1] (1906) 40 I.L.T.R. 142.

ing section of the earlier Act (section 8(2) of the Adoption of Children Act (Northern Ireland), 1929) enabled the rule making authority of the Supreme Court to make rules determining by which division or court applications to the Supreme Court for adoption orders were to be heard. I do not leave out of sight that the County Court Rules made under the Act of 1950 (S. R. & O. 1950, No. 123) prescribe that applications under the Act shall be served in the same manner as civil bills in equity suits and shall be listed and heard at equity sessions of the court. This, however, is merely a matter of convenience of procedure and falls short of constituting such proceedings equity matters. And in any case the power under the Act of 1950 of making county court rules (section 31(2) of the Act) only extends to the making of rules regulating the procedure and costs of applications to and proceedings *in* the county court. It is settled by the highest authority that a right of appeal to a superior court cannot be created by a rule made in exercise of such a power: *Attorney-General v. Sillem*[1]. Such a right can only be created by statute.

It remains to consider whether an appeal lies under section 4 of the County Court Amendment (Ireland) Act, 1882. I think it is important to notice the precise wording of this section. The corresponding appeal section of the Civil Bill Courts (Ireland) Act, 1851 (section 127) enacted that "It shall and may be lawful for any person who shall "think himself aggrieved by any decree or dismiss made or pro- "nounced by any assistant barrister to appeal therefrom to the judge "of assize for the respective counties in which such decree or dismiss "shall have been made". Section 4 of the Act of 1882, however, which replaced section 127 of the Act of 1851, provided as we have seen that "any person dissatisfied with any decree, dismiss, or order, "whether adverse to him or in his favour, pronounced by any county "court judge, in the exercise by him of any jurisdiction at law under "the several Acts conferring jurisdiction on county or civil bill "courts in Ireland, may, in manner herein provided, appeal there- "from to the judge of assize for the respective counties in which such "decree, dismiss, or order shall have been made or pronounced". And the section concluded by directing that nothing contained in the section should apply to any suit or matter instituted under the equitable jurisdiction vested in the county courts. It strikes one immediately that an essential difference between the words creating the right of appeal in section 127 of the Act of 1851 and those creating the right of appeal in section 4 of the Act of 1882 is the

[1] (1864) 10 H.L.C. 704.

introduction in the latter section of the phrase "in the exercise by "him of any jurisdiction at law under the several Acts" etc. What is the meaning of this phrase "any jurisdiction at law" in this section? When additional words are introduced into a section of an Act of Parliament which is substituted for a similar section of an earlier Act it is to be assumed that these additional words have been introduced for some purpose. It is a well established principle in the construction of statutes that the Legislature is deemed not to waste its words or to say anything in vain, that every word in every statute must have a meaning given to it, and that no words in any Act of Parliament are to be treated as surplusage if any meaning can be put upon them: see *Auchterarder Presbytery v. Kinnoull*,[1] per Lord Brougham; *East London Railway Co. v. Whitechurch*[2] per Lord Cairns; *Quebec Railway Light Heat and Power Co. Ltd. v. Vandry*[3] per Lord Sumner. Reading the phrase "any jurisdiction at law" in section 4 along with the concluding sentence of the section I think it is plain that the Legislature had in mind the old distinction between claims at law and claims in equity and used these words "at law" to describe claims which would be regarded as common law claims, i.e. claims under what we are accustomed to call the ordinary civil bill jurisdiction of the county court. If Parliament had intended to provide generally that there should be an appeal to the judge of assize from every order made by a county court judge, except orders made in suits instituted under the equitable jurisdiction, this would have been sufficiently provided for without the insertion of the words "at law" in the phrase "any jurisdiction under the several Acts" etc. in the early part of section 4. Holding therefore that the words "any "jurisdiction at law", especially as they did not appear in the appeal section (section 127) of the Act of 1851, must have been inserted in section 4 of the Act of 1882 for a purpose and must be given a specific meaning, I am of opinion that section 4 cannot properly be construed as a section giving a general right of appeal to the judge of assize from all decisions of the county court judge with the exception of decisions in suits instituted under the equitable jurisdiction of the court, but that it is a section giving a right of appeal only in cases brought under the jurisdiction at law of the court, i.e. the jurisdiction in claims which would be brought by ordinary civil bill, and that it does not operate to give a right of appeal in cases under new statutory jurisdictions of the county court.

This view that the Legislature did not intend by section 4 of the

1 (1839) 6 Cl. & F. 646, 686.
2 (1874) L.R. 7 H.L. 81, 89.
3 [1920] A.C. 662, 676.

Act of 1882 to confer a general right of appeal to the judge of assize from all decisions of the county court judge in cases other than equity cases appears to me to be supported by section 3 of the County Court Appeals (Ireland) Act, 1889, which gave a right of appeal to the judge of assize from decisions of the county court judge in equity and in probate matters. So far as equity matters are concerned this, of course, virtually repealed the exception contained in the concluding sentence of section 4 of the Act of 1882. The fact, however, that this section 3 of the Act of 1889 conferred a right of appeal to the judge of assize in probate matters indicates that the Legislature did not consider that such a right of appeal in such matters had been already created by the right of appeal under section 4 of the Act of 1882 against any decision pronounced by a county court judge "in "the exercise by him of any jurisdiction at law under the several Acts "conferring jurisdiction on county or civil bill courts in Ireland".

It is to be noticed too that in subsequent Acts of Parliament conferring on the county court new statutory jurisdictions not falling within either the ordinary or equitable jurisdictions of the court one finds the Legislature inserting express provisions giving a right of appeal to the judge of assize, whereas if the appellants' contentions in the present case were well founded it would have been sufficient to rely upon existing rights of appeal. Thus in section 5 of the Local Government (Ireland) Act, 1898, which transferred to the county court the business of presentment sessions and the grand jury in relation to compensation for criminal injuries, express provision was inserted allowing an appeal from the decision of the county court to the judge of assize. So too in the Town Tenants (Ireland) Act, 1906, which by section 10 conferred upon the county court the jurisdiction for the determination of all matters under that Act, section 11 expressly provided for an appeal to the judge of assize (or a judge of the High Court as the case might be) in accordance with the provisions of the Acts relating to appeals in the case of ordinary civil bills. Again, in the Hire Purchase Act (Northern Ireland), 1940, it was expressly provided by section 18 that any person dissatisfied with an order made by a county court in the exercise of any jurisdiction conferred by the Act should be entitled to appeal from such order to the judge having jurisdiction to hear and determine appeals under the County Court Amendment (Ireland) Act, 1882. And see also section 8 of the Criminal Injuries Act (Northern Ireland), 1956. These instances suggest that when a new statutory jurisdiction was being conferred on the county court the Legislature considered that

express ad hoc provision needed to be made if a right of appeal was to be given from the decisions of the county court.

In some cases when entrusting a new jurisdiction to the county court Parliament has given a simple right of appeal from the county court to the Supreme Court. Instances of this are to be found in the Landlord and Tenant (War Damage) Act (Northern Ireland), 1941, section 33(7) and the Business Tenancies (Temporary Provisions) Act (Northern Ireland), 1952, section 9(3). Such appeals are normally heard by a single judge (Rules of the Supreme Court, Order 59 A, rule 4). In default of any provision to the contrary the procedure on such appeals consists of a full re-hearing of the case: *Ex parte McFadden*[1] per Palles C.B.; *Belfast Corporation v. Goldring*[2]; *Ulster Chemists Ltd. v. Hemsborough Investment Co. Ltd.*[3]. And this procedure appears to have been accepted by our own Court of Appeal in *Porter v. Corscadden*[4]. It would occur to one as being somewhat strange to find such a right of appeal being expressly conferred if there automatically accrued a right of appeal by way of full re-hearing by virtue of section 4 of the Act of 1882 or section 3 of the Act of 1889, and especially without the statute which conferred the right of appeal to the Supreme Court making any reference whatever to those other rights.

For these various reasons which I have perhaps dealt with at excessive length—my justification being as I conceive it the importance of the matter—I am of opinion that the type of appeal sought to be pursued by the appellants does not lie and that the only appeal from the county court under the Act of 1950 is the appeal on a question of law contemplated by section 31(1) of the Act. In my view therefore the present appeal should be dismissed upon the preliminary point raised by the respondents.

In the course of the argument Mr. Wilson requested me to state a case for the opinion of the Court of Appeal in the event of my conclusions being adverse to the appellants. If Mr. Wilson still wishes me to state a case I shall certainly be prepared to do so as was done by Gibson J. on a similar point in the case of *Stafford v. Teague*[5].

Preliminary objection upheld.

Appeal dismissed

1 (1888) Judgments of the Superior Courts in Ireland 165, 166.
2 [1954] N.I. 107.
3 [1957] N.I. 185.
4 [1931] N.I. 141.
5 (1907) 41 I.L.T.R. 135.

Solicitor for the appellant: *Albert Foye.*
Solicitor for the respondent: *L. I. G. Fox.*

Reporter's Note: The application for a case stated referred to in the judgment was not proceeded with.

IRVINE v. MCNULTY[1]

Gaming—Progressive whist—Whether hall where game played a "common gaming "house"—"Person having the care or management of a common gaming "house"—Gaming Act, 1845 (8 & 9 *Vict. c.* 109), *ss.* 2, 4.

The organiser of a whist drive should not be convicted under section 4 of the Gaming Act, 1845, as being "a person having the care or management of "a common gaming house" unless—

(i) the circumstances were such as to constitute the premises a common gaming house so as to be indictable as a nuisance at common law; or

(ii) such facts are proved as are stated by section 2 of the Act[2] to be sufficient to support an allegation that any premises are a common gaming house.

CASE STATED by the County Court Judge for the County of Tyrone.

The chairman of a society, known as the St. Lawrence's Society, was charged at petty sessions with being a person having the care or management of a common gaming house contrary to section 4 of the Gaming Act, 1845. The society, one of whose primary aims was the raising of funds for the building and repairing of schools and churches, had organised a series of progressive whist drives in the St. Patrick's Hall, Fintona, in County Tyrone. On January 14, 1959, while a whist drive was in progress, a constable entered the premises under a search warrant and seized two score-cards and a pack of playing cards.

The defendant was fined twenty shillings at petty sessions and appealed to quarter sessions where the decision of the resident magistrate was reversed. The county court judge found that the whist drive and the circumstances in which it was played did not constitute a substantial injury to public morals. Entrance was confined to members of the society, each of whom paid an admission fee of 2s. 6d. Twenty four games were played each evening, and after

[1] In the Court of Appeal before Lord MacDermott L.C.J., Black and Curran L.JJ.: Nov. 16, 1959.

[2] Gaming Act, 1845, s. 2: "In default "of other Evidence proving any "House or Place to be a common "Gaming House, it shall be suffi- "cient, in support of the Allegation "in any Indictment or Information "that any House or Place is a "common Gaming House, to prove "that such House or Place is kept or "used for playing therein at any "unlawful Game, and that a Bank is "kept there by One or more of the "Players exclusively of the others, or "that the Chances of any Game "played therein are not alike favour- "able to all the Players, including "among the Players the Banker or "other Person by whom the Game is "managed, or against whom the "other Players stake, play, or bet; "and every such House or Place "shall be deemed a common Gaming "House such as is contrary to Law "and forbidden to be kept by.... "all.... Acts containing any Pro- "vision against unlawful Games or "Gaming Houses."

each game the winning couple at each table moved to a different table. Prizes were distributed after each whist drive, the highest of which was £5 and was awarded for the evening's top score. There were further prizes of £2 for the first lady and gentleman, and £1 for the second lady and gentleman. In addition there was a "snowball" prize which would not necessarily be won at any particular whist drive, as a minimum top score was required. If that score was not attained, the prize was carried over to the next occasion and increased by £5. The maximum which this prize could reach was limited to £50.

On the facts proved or admitted and the inferences to be drawn from them the county court judge formed the opinion that the holding of the whist drive did not make the premises a common gaming house so as to be a nuisance at common law. He was further of opinion that as no bank was kept, and as the chances of the game were alike favourable to all the players, the provisions of section 2 of the Gaming Act, 1845, did not apply so as to constitute the premises a common gaming house under that section. Accordingly he held that the defendant was not a person having the care or management of a common gaming house contrary to section 4 of the Act. On the request of the complainant and appellant he stated this case for the opinion of the Court of Appeal.

Reid Q.C. and *Shaw* for the complainant and appellant. The hall in which this whist drive was held was a common gaming house because it was a place in which a large number of persons were invited habitually to congregate for the purpose of gaming: see *Jenks v. Turpin*[1] per Hawkins J. It is not necessary that there should be a nuisance at common law in order to sustain a conviction under section 4 of the Gaming Act, 1845. Neither is it correct to say that in the absence of evidence of a nuisance the case must be brought within the terms of section 2 of the Act. Where the learned county court judge went wrong was in confining himself to section 2 of the Act when he had come to the conclusion that the facts proved did not amount to a nuisance at common law. That section was designed to lighten the task of the prosecution and should not be applied so as to impose a limitation, in effect, upon the offence created by section 4.

The position is that the facts found are more than sufficient to sustain a conviction. Section 5 of the 1845 Act relieves the prosecution of the need to prove the existence of an element of gambling, but in this case the prosecution does not have to fall back on that section because of the findings with regard to the payment of the

[1] (1884) 13 Q.B.D. 505, 516.

admission fee, the distribution of prizes and the shuffling of partners: *Morris v. Godfrey*[1]; *R. v. O.K. Social and Whist Club, Ltd.*[2]; *R. v. Hendrick*[3].

The prosecution established a prima facie case by showing that playing cards were found on the premises. Section 8 of the 1845 Act throws the onus on the defence of disproving the existence of an element of wagering and on the reasoning in the authorities they have not succeeded in doing so in this case: *Lockwood v. Cooper*[4]; *Welton v. Ruffles*[5].

Section 4 of the 1845 Act established a new substantive offence, separate and distinct from, and quite independent of, any pre-existing statutory or common law offence: *Munro v. Kelly*[6]; *Bunton v. Miller*[7]. Before the passing of the 1845 Act it was necessary in every case to prove the premises to have been either kept for profit under the Unlawful Games Act, 1541, or kept so as to be a nuisance at common law. After the passing of the Act it became an offence to keep a common gaming house at all, quite irrespective of any effect on public morals, or of any element of gain or profit to the keeper or proprietor.

[CURRAN L.J. But before we can understand section 4 we have to know what a common gaming house is.]

That is ascertained by reference to the definition given by Hawkins J. in *Jenks v. Turpin*[8].

Conaghan Q.C. and *Higgins* for the defendant and respondent were not called upon.

LORD MACDERMOTT L.C.J.: This appeal, which comes before us on a case stated from the learned County Court Judge of Tyrone acting as Chairman of Quarter Sessions, arises out of a whist drive held in St. Patrick's Hall, Fintona, on January 14, 1959. Whilst the whist drive was in progress, a constable of the Royal Ulster Constabulary entered the premises under a search warrant granted by a justice of the peace and seized two score cards and a pack of playing cards. As a result of this raid the defendant, who was chairman of the society under whose auspices the whist drive was being held, was charged at petty sessions with being a person having the care or management of a common gaming house contrary to section 4 of the Gaming Act, 1845.

1 (1912) 28 T.L.R. 401.
2 (1929) 21 Cr. App. R. 119.
3 (1921) 15 Cr. App. R. 149.
4 [1903] 2 K.B. 428.
5 [1920] 1 K.B. 226.
6 (1911) 45 I.L.T.R. 179.
7 [1926] S.C.J. 120.
8 (1884) 13 Q.B.D. 505, 516.

The resident magistrate found the charge proved and fined the defendant twenty shillings. The defendant appealed to quarter sessions, where the learned county court judge, having adjourned the matter for consideration, reversed the decision of the resident magistrate. His most careful and helpful judgment is annexed to and forms part of the case stated.

On the facts proved or admitted and the inferences to be drawn from them, the learned county court judge formed the opinion that the holding of the whist drive did not make the premises a common gaming house so as to be a nuisance at common law. He was further of opinion that as no bank was kept, and as the chances of the game were alike favourable to all the players, the provisions of section 2 of the Gaming Act, 1845, did not apply so as to constitute the premises a common gaming house under that section. Accordingly, he held that the defendant was not a person having the care or management of a common gaming house contrary to section 4 of that Act. The question for this court is whether he was right in so holding.

Now it is important to keep in mind that this charge was brought under section 4 of the Gaming Act, 1845, and not under section 4 of the Gaming Houses Act, 1854. The latter section imposes penalties upon "any person, being the owner or occupier, or having the use of "any house, room, or place, who shall open, keep, or use the same for "the purpose of unlawful gaming....". In the circumstances, the charge not being brought under this section, I do not propose to consider its provisions further or to discuss what may be bound up in the words "unlawful gaming".

What is necessary, however, is to refer to the terms of section 2 of the 1845 Act, which was much canvassed here as well as in the court below, and which provides: "In default of other evidence proving "any house or place to be a common gaming house, it shall be "sufficient, in support of the allegation in any indictment or in- "formation that any house or place is a common gaming house, to "prove that such house or place is kept or used for playing therein at "any unlawful game, and that a bank is kept there by one or more of "the players exclusively of the others, or that the chances of any "game played therein are not alike favourable to all the players, "including among the players the banker or other person by whom "the game is managed, or against whom the other players stake, play, "or bet; and every such house or place shall be deemed a common "gaming house such as is contrary to law and forbidden to be kept by "all.... Acts containing any provision against unlawful games or "gaming houses."

That section is directed to what will be sufficient to prove that a house or place is a common gaming house, and it is admitted in this case that the circumstances which the section deems sufficient were not in fact proved. Nevertheless, the prosecution contends that the established facts show an offence under section 4 of the 1845 Act to have been committed.

As already indicated, the learned county court judge took the view that, in default of the special proofs provided for by section 2, it was necessary to prove the premises to be a common gaming house, the keeping whereof would be indictable as a nuisance at common law. He held that the evidence adduced was insufficient for that purpose. He found, inter alia, that the whist drive in question did not involve any substantial injury to public morals. It was held under the auspices of the St. Lawrence's Society—a society of an entirely lawful nature—one of whose primary aims is the raising of funds for the building and repairing of schools and churches. One of the methods adopted for the raising of money was the holding of a series of progressive whist drives. Entrance was confined to members of the society, each of whom paid an admission fee of 2s. 6d. Twenty four games were played each evening, and after each game the winning couple at each table moved to a different table, with the result that by the end of the evening each person would have moved a considerable number of times. Prizes were distributed after each whist drive. The highest prize, £5, was awarded for the evening's top score, and there were other prizes of £2 for the first lady and gentleman, and £1 for the second lady and gentleman. In addition there was a "snowball" prize which would not necessarily be won at any particular whist drive, as a certain minimum top score was required. If that score was not attained, the prize was carried over to the next occasion and increased by £5. The maximum which this prize could reach was limited to £50. That is quite a substantial figure, but so far as I can see, the learned county court judge had no difficulty at all in coming to the conclusion that there was, nevertheless, no question of any real injury to public morals.

I think it is clear that a place where progressive whist is played could be a common gaming house, depending upon the terms and conditions of play and the circumstances in which the game is played. It is not, however, sufficient merely to prove that progressive whist is being played in order to ground a prosecution for a common law nuisance. One has to go further than that and show that what was being done was prejudicial to public morals—a matter which

may be very much one of degree, taking into account all the circumstances.

The prosecution argues that the test which the learned county court judge applied was relevant only to the conception of a common gaming house which would render it indictable at common law, and that he erred in applying that test in relation to a charge under section 4 of the 1845 Act. The contrary view, which found favour in the court below, is simply that the expression "common gaming "house" in the Act must be construed as having the same meaning which it had at the time of the passing of the Act.

In support of the prosecution's contention, counsel referred to passages from the judgment of Hawkins J. in the well-known case of *Jenks v. Turpin*[1] and in particular to that part of his judgment where he says[2]: "The law does not require that it shall be a public "gaming-house: a *common* gaming-house is that which is forbidden, "that is, a house in which a large number of persons are invited "habitually to congregate for the purpose of gaming." It is said that those words contain a definition of the expression "common gaming "house" for the purpose of the Gaming Acts.

It is important to note, in the first place, that *Jenks v. Turpin*[1] was decided under section 4 of the Gaming Houses Act, 1854, and not under section 4 of the Gaming Act, 1845. Secondly, it should be observed that in the passage referred to, Hawkins J. was dealing with an argument that the fact that people resorted to the premises by special invitation precluded it from being a common gaming house. There is no indication that he had any intention of defining exhaustively the nature of a common gaming house. I have read the judgments of Hawkins and Smith JJ. with care, and can find nowhere any indication that a distinction is to be drawn between the expression "common gaming house" as understood by the common law, and the same expression as used in the Gaming Acts. Earlier in his judgment[3] Hawkins J. deals with the characteristics of a common gaming house which would be a nuisance at common law and indictable as such, and the same ingredients are to be found mentioned in the judgment of Smith J.[4]

There can be no doubt, and it is not disputed, that at common law, in order to be guilty of keeping a common gaming house, one must have kept a house which worked some detriment to public morals; but what Mr. Reid, for the prosecution, submits is that this is not

[1] (1884) 13 Q.B.D. 505.
[2] Ibid. 516.
[3] Ibid. 514, 515.
[4] Ibid. 532, 533.

necessary in order to make good a charge under section 4 of the 1845 Act. He says that Hawkins J.'s description of a common gaming house, as "a house in which a large number of persons are invited "habitually to congregate for the purpose of gaming", is a conclusive definition for the purpose of the section. I know of no authority for this attempted distinction, and if one looks at the terms of section 2 of the 1845 Act, the submission becomes, in my opinion, quite untenable.

That section opens with the words "in default of other evidence "proving any house or place to be a common gaming house, it shall "be sufficient, in support of the allegation in any indictment or "information that any house or place is a common gaming "house....". Those words, at the very threshold of the section, far from indicating a new statutory meaning of the phrase "common "gaming house", have, to my mind, quite the contrary effect.

Accordingly, it seems to me that the learned county court judge adjudicated correctly when he confined himself to considering (a) whether circumstances were proved which would constitute the premises a common gaming house so as to be indictable as a nuisance at common law, and (b) in default of such evidence, whether the special proofs provided for by section 2 of the 1845 Act had been made out.

For my part, I do not think it would occur to any reasonable person to describe what the defendant and his friends were doing as the keeping of a common gaming house. It is said, however, that the object of this prosecution has been to clarify the legal position. It may well be that the police experience considerable difficulty in enforcing the Gaming Acts, for they form a complex and difficult code, and it is not always easy to reconcile all the decisions. I hope, however, that the task of clarification will not be left to the courts alone. So far as they are concerned the time is now ripe for the introduction of legislation more in keeping with modern conditions which will supersede the existing enactments and sweep away their obscurities and anomalies.

I do not intend to go any further into a consideration of the various authorities that were cited before us. To do so might only be to cause further confusion. For the reasons which I have already stated, I think that the learned county court judge applied himself properly to the issue before him and reached the correct conclusion. That being so he had no choice but to dismiss the charge against the defendant.

BLACK L.J.: This prosecution was brought under section 4 of the Gaming Act, 1845; a section which was directed against the owner or keeper of any common gaming house. At the time when that Act was passed the phrase "common gaming house" was a phrase well known to the law both in England and in Ireland. It meant a house in which large, or substantial, numbers of persons congregated for the purpose of gaming. That, however, was not all that it meant. In order to make any premises a common gaming house in the common law sense, they had to be, or tend to be, prejudicial to public morals, that is, that the amount of the stakes, or the length of time during which the house was kept open, had to be such as would be likely to injure the morals of those who gamed in the house.

When Hawkins J. in *Jenks v. Turpin*[1] said that the keeping of a common gaming house was in itself a nuisance, he must be taken as meaning such a gaming house as was not only common, but a nuisance in the sense which I have attempted to indicate.

In that case the court (Hawkins and Smith JJ.) had no hesitation in holding that the club in question was a common gaming house because the game called "baccarat", at which amounts of £50 to £300 and sometimes £1,000 were won, was habitually played there. Another circumstance was that the bank changed every twenty minutes. This was material which would almost compel a court to hold that the premises were a common gaming house such as would found an indictment at common law.

So far as the common law definition is concerned, the learned county court judge has specifically found in the case stated that the whist drive carried on upon the premises known as St. Patrick's Hall, did not constitute any substantial injury to public morals. In effect, that was a decision that the premises did not constitute a common gaming house in the common law sense. I agree with that decision but should point out that it does not necessarily follow that a progressive whist drive might not have a prejudicial effect upon public morals depending upon all the circumstances. A good deal could turn, for instance, upon the amount of money which could be won. In this case the "snowball" prize was coming dangerously high, and might well have been found to constitute a detriment to public morals. However, that is not the case here in view of the specific finding to the contrary.

Now if the premises with which the present case is concerned were not a common gaming house by applying the common law standard,

[1] (1884) 13 Q.B.D. 505, 516.

the next question is whether by virtue of section 2 of the 1845 Act they should be held to be a common gaming house by falling within the tests prescribed by that section. Whatever may be the meaning of the phrase "unlawful game" as used in section 2, still, in order to constitute a common gaming house in reliance on that section, it is not only necessary under the terms of the section to establish that an unlawful game was being played but it is also necessary to prove either that a bank was kept or that the chances were not alike favourable to all players. The court of quarter sessions has found that neither of those requirements has been fulfilled and therefore the case cannot come within section 2.

Accordingly, there being no secure basis for saying that the premises in question were a common gaming house either at common law or under section 2, I am of opinion that the learned county court judge was perfectly correct in holding, as he did, that the decision of the resident magistrate should be set aside.

CURRAN L.J.: I agree and have nothing to add.

Appeal dismissed.

Solicitor for the appellant: *Chief Crown Solicitor.*
Solicitor for the respondent: *James McNulty.*

S.M.M.

NEWRY URBAN DISTRICT COUNCIL v. COLLINS[1]

Public health—Towns improvement—Demolition of dangerous buildings—Recovery of expenses from owner—Whether agent receiving rents liable as an owner—Towns Improvement Clauses Act, 1847 (10 & 11 Vict. *c.* 34), *ss.* 3, 75, 76—*Towns Improvement (Ireland) Act*, 1854 (17 & 18 *Vict. c.* 103), *s.* 39.

Section 75 of the Towns Improvement Clauses Act, 1847, as incorporated by section 39 of the Towns Improvement (Ireland) Act, 1854, enables the urban district council of a town to which the Act of 1854 applies to obtain an order at petty sessions requiring the owner of dangerous or ruinous buildings to take down or secure such buildings, and on failure of the owner to comply with such order empowers the council to execute the required works at the expense of the owner, and section 76 of the Act provides for the recovery of such expenses by means of a justice's warrant. By section 3 of the Act the term "owner" in relation to land or buildings is defined as "the person for the "time being entitled to receive.... the rack rent from the occupier or "occupiers thereof."

Held, by the Court of Appeal that the words "the person entitled to "receive the rack rent" refer only to a person entitled to receive rent in his own right and not to a person receiving the rent as an agent, and accordingly that a solicitor collecting rents of premises in respect of which orders had been made under section 75 of the Act was not liable to pay to the council the cost of works executed by the council upon failure to comply with the orders.

CASE STATED by the Resident Magistrate sitting at Newry Petty Sessions.

On January 8, 1958, the Urban District Council of Newry applied to petty sessions for two orders under section 75 of the Towns Improvement Clauses Act, 1847, requiring the defendant, a solicitor practising in Newry, to take down, re-build, repair or otherwise secure to the satisfaction of the Council's surveyor certain dwelling-houses in Market Street and Market Square, Newry, and the resident magistrate made the orders sought. On April 8, 1959, the Council applied for a warrant under section 76 of the Act for the recovery of the expenses incurred by the Council in taking down and securing the said dwelling-houses.

On the hearing of the latter application the following facts were admitted or proved:

The persons beneficially entitled to the premises in question were nine in number, of whom three resided in the Urban District of Newry, five lived out of Northern Ireland and one had not been

[1] In the Court of Appeal before Lord MacDermott L.C.J., Black and Curran L.JJ.: Sept. 16, 1959.

traced; the defendant had been in receipt of the rents and profits of the premises as agent for some years prior to 1958; the orders made on January 8, 1958, had been served personally on the defendant, who had not complied with them; the demolition of the premises was carried out by a contractor on behalf of the Council at a total cost of £143 8s. 6d.; the defendant, on receiving a demand from the Council for that sum, paid to the Council the sum of £58 11s. 4d., being the net amount of the rent held by him after deduction of commission and expenses, but refused to pay the balance.

It was contended for the Council that the defendant was an "owner" of the premises for the purposes of the Act of 1847, and it was contended for the defendant that he was not an owner of the premises or liable as such, or, in the alternative, that if he was liable, he was only liable to the extent of the rent which he had received.

The resident magistrate, having reserved his decision, upheld the defendant's contention and dismissed the summons, but stated this case at the request of the Council for the opinion of the Court of Appeal as to whether he had been correct in law in so holding.

O'Donnell for the Council. There appear to be no authorities on this point under the Act of 1847, although it applied both in England and in Ireland. The defendant relies on *Adams and Watts v. Southall Rating Authority*[1], but the wording of the Act under consideration in that case was quite different from the wording of the Act of 1847, which refers to "the person entitled to receive.... the rackrent", and I submit it is not necessary that the person concerned should receive the rent beneficially.

[BLACK L.J. This statute is of a penal nature, and we must construe it strictly.]

I would say that it was passed for the benefit of the public, and is to be construed accordingly.

[LORD MACDERMOTT L.C.J. The term used is "owner". Has that fact not to be borne in mind in considering the meaning of the definition?]

I submit that the effect of the definition is to extend the ordinary meaning of the term "owner".

The words of the Act under consideration in *Adams and Watts v. Southall Rating Authority*[1] were "the person entitled to receive the "rent payable" in respect of the premises, which, I submit, go further

[1] [1943] K.B. 359.

towards suggesting beneficial ownership than the words of the Act of 1847. In this case, we have the words "for the time being entitled to "receive...." which would suggest that a temporary arrangement whereby an agent would collect the rent for a period was intended to be included.

[LORD MACDERMOTT L.C.J. Sections 77 and 78 are relevant. They deal with cases in which the owner of the premises cannot be found, and if they are put into operation, it may be that there will be a balance of money in the hands of the Council to be restored to the owner. If a collecting agent is to be regarded as an "owner" for the purposes of the Act, he might not have authority to receive such moneys or to give a receipt for them.]

I would submit that the Council could pay over such moneys to an agent.

[LORD MACDERMOTT L.C.J. Then it would appear that if your argument is correct, the beneficial owner would not be an owner for the purposes of the Act.]

It may be that there can be more than one owner for the purposes of the Act.

[BLACK L.J. There are decisions to that effect under the Public Health Acts.]

[LORD MACDERMOTT L.C.J. Those Acts expressly provide that an agent may be treated as an owner.]

In *Adams and Watts v. Southall Rating Authority*[1], the court was dealing with a private Act procured by a local authority for its own purposes, and such an Act is to be construed strictly—see *Altrincham Union Assessment Committee v. Cheshire Lines Committee*[2]—but in this case we are dealing with a public general statute.

Kennedy for the defendant was not called on.

LORD MACDERMOTT L.C.J.: This is an appeal by way of a case stated by Mr. J. Ritchie Wilson, R.M., on the hearing of an application by the Urban District Council of Newry for the issue of a warrant for the recovery of the expenses incurred by the Council in connection with the demolition of certain dangerous premises in Newry. The original order requiring the demolition of the premises had been made by the same resident magistrate in 1958, and had been served on the defendant, who carries on business in Newry as a

[1] [1943] K.B. 359.

[2] (1885) 15 Q.B.D. 597, 602-3.

solicitor and who acted at all times material to these proceedings as collecting agent for the persons entitled to the rents issuing out of the premises. The demolition order having been made and served upon the defendant was not complied with, and the complainants, the Urban District Council, proceeded to demolish the premises, acting under the powers conferred upon them by section 75 of the Towns Improvement Clauses Act, 1847, as incorporated by section 39 of the Towns Improvement (Ireland) Act, 1854, and then commenced the present proceedings for the recovery of the expenses which they had incurred, as provided for in sections 75 and 76 of the Act of 1847. The last part of section 75 enacts as follows: "....and all the "expenses of putting up every such fence and of taking down, "repairing, rebuilding, or securing such building, wall, or other "thing, shall be paid by the owner thereof."

Section 76 reads thus: "If such owner can be found within the "limits of the special Act, and if, on demand of the expenses afore-"said, he neglect or refuse to pay the same, then such expenses may "be levied by distress, and any justice may issue his warrant accord-"ingly."

In this case the "limits of the special Act" are to be taken as referring to the Urban District of Newry. In point of fact the beneficial ownership of these premises is split up amongst nine persons, only three of whom reside in the Urban District, and one of whom has not yet been traced, but the complainants have sought to bring section 76 into operation by demanding that the defendant should pay the expenses of the works. The defendant paid over to the Council such money as he had in hand in respect of the rents of the premises, but refused to pay the balance, and thereupon the Council applied to the resident magistrate for the issue of his warrant for the recovery of the amount outstanding, alleging that, for the purposes of the section, the defendant was the "owner" of the premises. The resident magistrate dismissed the application but stated this case for the opinion of this court. The sole question which we have to determine is whether in point of law a person such as the defendant who is authorised to receive rents as an agent for the person or persons beneficially entitled is to be treated as an "owner" for the purpose of section 76 of the Act of 1847.

The term "owner" is defined by section 3 of that Act as meaning "the person for the time being entitled to receive, or who, if such "lands or buildings were let to a tenant at a rack rent, would be "entitled to receive, the rackrent from the occupier thereof." This

definition is very similar to that contained in section 1 of the Towns Improvement (Ireland) Act, 1854, but differs markedly from the definitions of the term which are found in certain of the Public Health Acts, such as the English Public Health Acts of 1848 or 1875, or the Public Health (Ireland) Act, 1878, section 2 of which provides that the word "owner" shall mean "the person for the time being receiving the rackrent of the lands or premises . . . whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent."

On reading the words of section 3 of the Act of 1847, one would assume that, prima facie, the expression "the person entitled to "receive the rack rent" referred to a person entitled as of right to such rent, for that is the ordinary and natural meaning of the language used. It does not seem to me that there is anything in the context to call for an enlargement of this meaning so as to include a person such as the present defendant who receives the rents as an agent. No doubt he may be said, in one sense, to be "entitled" to receive the rents by virtue of his agency, but in my opinion the definition is to be read as referring to a person entitled in his own right to the rents. If this is so, then of course the defendant is not the owner of these premises, and the resident magistrate was right in holding as he did.

I think one must assume that if the Legislature had intended that agents in receipt of rents were to be treated as owners, it would have said so in clear terms, as it did in other Acts, such as those of 1848, 1875 and 1878 to which I have already referred. In the relevant enactments which are now before us, however, one finds no trace of anything to suggest that an agent receiving rents on behalf of some other person was intended to be made liable as an owner.

This view of the matter is borne out by the case of *Adams and Watts v. Southall Rating Authority*[1], a decision of a Divisional Court consisting of Charles and Tucker JJ. The court in that case had to consider the meaning of the term "owner" as it was used in a private Act containing the definition, "the person who is entitled to receive "the rent payable" in respect of the premises concerned. In his judgment, Charles J. said[2]: "It has been contended for the respondent "rating authority that the words 'the person who is entitled to receive "'the rent payable' in s. 118, sub-s. 2, of the Middlesex County "Council (General Powers) Act, 1938, refer, not only to the person "who receives the rent ultimately in his own right, but also to a person "through whose hands the rent passes on its way to the proprietor,

[1] [1943] K.B. 359. [2] Ibid. 361.

"such as an estate agent employed to collect rents. That contention "seems to me to be fallacious. The statute provides that the expres- "sion 'owner' in relation to a hereditament means 'the person who is " 'entitled to receive the rent'. That means to receive and keep the "rent as his own". Tucker J., concurring, said this[1]: "I agree. Prima "facie the definition of 'owner' in s. 118, sub-s. 2, of the Act of 1938, "means a person who is entitled to receive rent in his own right. That "that is the meaning to be attributed to 'owner' in that section appears "from the fact that when the legislature wishes to render agents who "have collected rents liable for the payment of rates it uses very clear "language to achieve that result."

There is no such clear language in the statute before us, and for these reasons I would hold that the resident magistrate was right in law in holding that the defendant was not an owner within the meaning of the 1847 Act.

Black L.J.: I agree.
Curran L.J.: I agree.

Appeal dismissed.

Solicitor for the Council: *Kevin P. Neary.*
Solicitors for the defendant: *Collins & Collins.*

J.P.

[1] [1943] K.B. at 361.

BELFAST CORPORATION . . . . APPELLANTS;

AND

O. D. CARS LTD. . . . . RESPONDENTS[1]

Northern Ireland—Statute—Validity—"Take any property without compensation"—Meaning of "take"—Meaning of "property"—Town and country planning restrictions on development—Injurious affection—Claim for compensation—Statutory provision excluding compensation—Government of Ireland Act, 1920 (10 & 11 *Geo.* 5, *c.* 67), *s.* 5(1)—*Ministries of Northern Ireland Act* (*Northern Ireland*), 1921 (12 *Geo.* 5, *c.* 6), *s.* 3(1)—*Planning and Housing Act* (*Northern Ireland*), 1931 (21 & 22 *Geo.* 5, *c.* 12), *s.* 10(2)—*Planning* (*Interim Development*) *Act* (*Northern Ireland*), 1944 (7 & 8 *Geo.* 6, *c.* 3), *s.* 6(4).

Conflicts of Laws—Confiscatory or political legislation—Town and country planning restrictions—Whether confiscatory—"Take . . . . property without compensation"—Validity of Act of Northern Ireland.

Evidence—Minister, by—Certificate—Whether Ministry considers restriction reasonable—Appropriate evidence—Ministries of Northern Ireland Act (*Northern Ireland*), 1921, *s.* 3(1).

Town and Country Planning—Restrictions on development—Whether confiscatory.

By section 5(1) of the Government of Ireland Act, 1920: "In the exercise of "their power to make laws neither the Parliament of Southern Ireland nor "the Parliament of Northern Ireland shall make a law so as either directly or "indirectly to establish or endow any religion, or prohibit or restrict the free "exercise thereof, or give a preference, privilege, or advantage, or impose any "disability or disadvantage, on account of religious belief . . . . or divert from "any religious denomination the fabric of cathedral churches, or, except for "the purpose of roads, railways, lighting, water or drainage works, or other "works of public utility upon payment of compensation, any other property, "or take any property without compensation."

By section 10(2) of the Planning and Housing Act (Northern Ireland), 1931: "Property shall not be deemed to be injuriously affected by reason of the "coming into operation of any provisions inserted in a planning scheme, "which prescribe the space about buildings or limit the number of buildings "to be erected, or prescribe the height or character or user of buildings . . . . "and which the Ministry, having regard to the nature and situation of the "land affected by the provisions, considers reasonable for the purpose . . . ."

By section 6(4) of the Planning (Interim Development) Act (Northern Ireland), 1944: "Where (*a*) an interim development application is refused . . . . "then, the applicant . . . . shall, if he makes a claim for the purpose be "entitled to obtain from the local authority such compensation in respect of

[1] In the House of Lords: Present—Viscount Simonds, Lord Radcliffe, Lord Cohen and Lord Keith of Avonholm: Nov. 11, 12, 16, 17, 18, 19, Dec. 14, 1959. The report of this case is, by kind permission of the Incorporated Council of Law Reporting for England and Wales, taken from the report in the Appeal Cases volume in the 1960 Law Reports.

"any injurious affection of his property . . . . as he would be entitled to obtain "under the [Act of 1931] if such injurious affection had been suffered as a "consequence of the coming into operation of a planning scheme. . . ."

A local authority in Northern Ireland refused an interim development application under section 2 of the Act of 1944 made by a company for permission to erect factories and shops on its land. The ground of the refusal was that the height and character of the proposed buildings would not be in accordance with the requirements of the site, which was zoned as residential. Consequently, the company claimed compensation for injurious affection:—

Held, (1) that section 6(4) of the Act of 1944 incorporated section 10(2) of the Act of 1931; (2) that the words "take any property without compensa- "tion" in section 5(1) of the Act of 1920 were not confined to the property of religious bodies, and also that they were governed by the words "either "directly or indirectly"; (3) that the rights which in the aggregate constituted ownership of property could not themselves be called "property," and so the right to use property in a particular way was not itself property; accordingly, the restrictions imposed by these Planning Acts could not be described as a purported authorisation to "take any property without "compensation" in contravention of section 5(2) of the Act of 1920; (4) that, therefore, the company was not entitled to compensation.

Held, further, that, in order to satisfy the requirements of section 10(2) of the Act of 1931 as to proof that the Ministry considered that the restrictions imposed were reasonable, a certificate shall be issued under the Minister's seal and duly authenticated; such a certificate, when tendered, would prove itself under section 3(1) of the Ministries of Northern Ireland Act (Northern Ireland), 1921. It was not satisfactory that oral evidence should be given by an official speaking merely on instructions without having any personal knowledge of the matter.

Decision of the Court of Appeal in Northern Ireland [1959] N.I. 62, reversed.

APPEAL from the Court of Appeal in Northern Ireland (Lord MacDermott C.J. and Black L.J.).

This was an appeal from an order of the Court of Appeal in Northern Ireland dated March 26, 1959, whereby the court allowed the appeal of the respondent company, O. D. Cars Ltd., from the order of the High Court of Justice in Northern Ireland, Queen's Bench Division, filed on June 26, 1957, and made on the hearing of a case stated by an arbitrator pursuant to the Acquisition of Land (Assessment of Compensation) Act, 1919, wherein the present respondents were claimants and the present appellants, the Belfast Corporation, were the respondents.

The facts, stated by Viscount Simonds, were as follows: The respondents, a limited company registered in Belfast, owned in fee farm certain land at Alexandra Park, Belfast. On buildings erected on that land they had for many years carried on the business of garage

proprietors and general motor engineers. On February 9, 1954, they made an application to the appellants, the Belfast Corporation, for permission to erect on the land further industrial and commercial premises, namely, lock-up shops on Antrim Road and factories or warehouses on the back portion. The application was made pursuant to the provisions of section 2 of the Planning (Interim Development) Act (Northern Ireland), 1944, to the appellants as the interim development authority. Such an application was known as an interim development application.

On March 2, 1954, the appellants refused the application on the grounds (a) as to the lock-up shops, that the height and character of the proposed development would not be in accordance with their requirements for the site, namely, development to be in shops with dwellings over, minimum height 25 feet, and (b) as to the industrial or commercial use of the remainder of the site, that the site was zoned as residential and that the character and user of the proposed development would be incompatible with such zoning.

This refusal led to a claim for compensation for injurious affection under the Act which, in accordance with its provisions, was referred to the official arbitrator appointed thereunder. The relevant statutory provisions were contained in the Planning and Housing Act (Northern Ireland), 1931, and the Planning (Interim Development) Act (Northern Ireland), 1944, hereafter called the 1931 Act and the 1944 Act. The former Act, after providing for the making of planning schemes to be prepared and adopted by local authorities, and to be approved by the Minister, and sundry other relevant matters, by section 9 enacted that any person whose property was injuriously affected by the coming into operation of a planning scheme should, if he made a claim for the purpose within the time therein mentioned, be entitled to obtain compensation in respect thereof from the responsible authority. But that right was subject to the limitation contained in section 10, which provided by subsection (1) that where property was alleged to be injuriously affected by reason of any provisions contained in a planning scheme, no compensation should be paid in respect thereof if or so far as the provisions were also contained in any public, general or local Act in force in the area or otherwise as therein mentioned, and by subsection (2), which was the subsection relevant to this appeal, as follows: "Property shall not be "deemed to be injuriously affected by reason of the coming into "operation of any provisions inserted in a planning scheme, which "prescribe the space about buildings or limit the number of buildings "to be erected, or prescribe the height or character or user of build-

"ings.... and which the Ministry, having regard to the nature and "situation of the land affected by the provisions, considers reasonable "for the purpose...."

Development under the Act of 1931 made slow progress and was in due course supplemented by the Act of 1944. Section 1(1) of that Act deemed all land which was not the subject of a planning scheme under the earlier Act, or of a resolution to prepare and adopt such a scheme to be subject to a resolution to prepare a planning scheme under the Act. Section 2 directed the Ministry to make a general interim development order with respect to land to which such a resolution applied, and provided that such an order might empower any local authority specified therein to permit the development of land in accordance with the provisions thereof. In accordance with the duty thus placed upon it, the Ministry, on July 10, 1944, made the Planning (General Interim Development) Order (Northern Ireland), 1944 (S. R. & O. 1944, No. 58), which empowered the appellants to grant permission for the development of land within the county borough of Belfast. Under section 6(4) of the Act of 1944 the respondents made the claim for compensation now under review. That subsection provided, so far as material: "Where (*a*) an interim "development application is refused.... then, the applicant.... "shall, if he makes a claim for the purpose, be entitled to obtain from "the local authority such compensation in respect of any injurious "affection of his property.... as he would be entitled to obtain under "the [Act of 1931] if such injurious affection had been suffered as a "consequence of the coming into operation of a planning scheme...."

The claim for compensation having been made and refused upon the grounds already stated, a number of questions were raised before the arbitrator which led him, without proceeding to an award, to state a consultative case for the opinion of the court in which he posed two questions as follows: "(1) Whether I am entitled to award "compensation to the claimant for injurious affection of the said "land. (2) Whether the evidence of Mr. A. P. Fitzgerald is sufficient "to satisfy the requirements of section 10(2) of the Planning and "Housing Act (Northern Ireland), 1931."

The relevant facts relating to the second question were that a Mr. Ronald Green, assistant secretary to the Ministry of Health and Local Government, by letter of January 3, 1955, told the solicitor of the appellants that Mr. A. P. Fitzgerald would attend the hearing of the claim before the arbitrator and would be prepared to state that

"the decision on the application of O. D. Cars Ltd. made by the "corporation.... was reasonable and was based on considerations "which, if included in a scheme formulated under the above-"mentioned Acts, would be approved by the Ministry."

Mr. Fitzgerald duly attended the hearing. He proved that he was authorised by the Ministry to give evidence on its behalf, that he had no personal knowledge of the facts of the case, that he was not present at discussions which he said had taken place at the Ministry with regard to the matter, but that he was authorised by the Ministry to state and did state that as a result of such discussions the Ministry considered that the decision of the appellants on the application of the respondents was reasonable, and was based on considerations which, if included in a scheme formulated under the relevant Acts, would be approved by the Ministry.

F. A. L. Harrison Q.C. and *Maurice Gibson Q.C.* (both of the Bar of Northern Ireland) and *James McQuitty* (of the English Bar and the Bar of Northern Ireland) for the appellant corporation. In the Court of Appeal Lord MacDermott C.J. rightly formulated the four questions to be considered: "(1) On its true construction does "section 6(4) of the Act of 1944 incorporate a reference to section "10(2) of the Act of 1931 as well as to the compensatory provisions of "section 9 of that Act? (2) If so, does section 10(2)—assuming (A) the "fulfilment of its conditions, and (B) its validity as an enactment— "defeat the appellants' claim for compensation? (3) If the answer "to (2) is 'Yes' are the conditions of section 10(2) fulfilled? (4) If the "answer to (2) is 'Yes', is section 10(2) a valid enactment having "regard to the provisions of section 5 of the Government of Ireland "Act, 1920."

On question (1) the appellants agree with the reasoning of Lord MacDermott. In the context of the Acts entitlement to compensation for injurious affection is the same whether or not the claim arises from the refusal of an interim development application or as a result of the operation of a perfected planning scheme. As to question (2), the appellants are not now concerned with it. As to question (3), it is agreed that the height, character and user of the buildings were prescribed, but Lord MacDermott was wrong in rejecting the evidence of Mr. Fitzgerald; his evidence satisfied the condition of section 10(2) as expressed in the words "which the Ministry.... "considers reasonable for the purpose." As to question (4), the constitutional question, it cannot be accepted that the imposition of a restriction on the use of property in the hands of its owner can

amount to a taking within section 5(1) of the Act of 1920. On the state of the law in 1920 compensation was unknown in Ireland for such a restriction. The legislative intent can be discovered by reference to what was eligible for compensation in 1920 at common law or by statute. Further, section 5(1) in the context of the Act extends only to the acquisition of property without compensation. The prohibition in the section does not extend beyond a very limited class of "pro-"perty". In 1920 "property" could have been the subject-matter of compensation but not rights in property—the right to use property in a particular way. If that is right, it is conclusive of this appeal. But, even if the taking of property within section 5(2) of the Act of 1920 extends to prohibitions relating to the use of property, the Planning Acts are regulatory and the discretion vested in the Ministry by section 10(2) of the Act of 1931 is reasonably framed so as to accomplish the objects of the Act. The jurisdiction of the court to determine the validity of Northern Irish legislation is not ousted by the power so vested in the Ministry to declare the reasonableness of the provisions of a planning scheme. Even if section 10(2) has the effect of vesting in the Ministry the power of determining whether property may be taken without compensation to the exclusion of the court's jurisdiction, it is by virtue of the words "which the Ministry . . . . considers "reasonable for the purpose," and these words are severable from the rest of the subsection, so that they alone are void as being ultra vires the Parliament of Northern Ireland. Having regard to the pith and substance of section 10(2), it is not ultra vires the Act of 1920.

As to question (1), the only right a person, whose interim planning application has been refused, has to recover compensation for injurious affection of the property is conferred by section 6(4) of the Act of 1944, a right to such compensation as he would have been entitled to under the Act of 1931 if injurious affection had been suffered in consequence of the coming into operation of a planning scheme. Section 10(2) of the Act of 1931 excludes from the category of injurious affection loss sustained by reason of the coming into operation of any provision in a planning scheme which prescribes the height, character or user of buildings and which the Ministry considers reasonable for the purpose. The refusal of the interim planning application did prescribe the height, character and user of the buildings to be erected, and if the damage had been suffered as a result of the coming into operation of a planning scheme, the first condition of section 10(2) would have been satisfied. See sections 1, 2(1), 4, 5(2), 6, 7, 8, 9, 10(1), 44, 45(1) and 46 of the Act of 1931, the objects of which were to be achieved by the provisions of a scheme.

At the time of this Act there was no compensation in respect of restrictions on the height or character of buildings: see section 59(2) of the Housing, Town Planning, etc., Act, 1909. That Act only dealt with land in the course of development or likely to be developed: see sections 54(1), 55(2) and 58(1), the last one being the parent of section 9(1) in the Act of 1931. The Act of 1909 never applied to Ireland, though there was power to apply it.

The "purpose" referred to in section 10(2) of the Act of 1931 is the purpose of the provisions of a planning scheme.

The Planning Schemes (Procedure) Regulations, 1945 (Northern Ireland) (S. R. & O. (N.I.), 1945, No. 110), show that before the stage of section 10(2) is reached the Ministry has considered the provisions of the scheme in their general context, and by the time the Ministry approves a scheme it has at every stage been concerned with hearing the objections of persons affected: see regulations 3, 4(3), 5, 8, 12(2), 17, 19. The Ministry must have regard to the statutory matters prescribed. It is not an arbitrary discretion which is confided to the Ministry, which must have regard to the nature and situation of the land affected. Within the statutory limits the Ministry is made judge of what is reasonable. The responsibility of framing schemes to suit the public needs is with the Ministry, which must determine whether the prohibitions on the use of property are proper to the carrying out of the Act. *Fawcett Properties Ltd. v. Buckingham County Council*[1] shows in the context of the English planning legislation that the words "such conditions as they think fit" (in section 14(1) of the Town and Country Planning Act, 1947), mean "having regard "to their statutory duties and to local planning considerations." See also sections 2(6) (10), 3(1), 4, 5(1), 6, 9 and 10(2) of the Act of 1944. "Injurious affection" has the same meaning in both the Act of 1931 and the Act of 1944. Under the Act of 1944, by section 6(4), an applicant is entitled to "such compensation.... as he would be "entitled to obtain under the principal Act if such injurious affection "had been suffered as a consequence of the coming into operation of "a planning scheme." The error of the respondents is to equate "injurious affection" with damage or loss. By virtue of section 6(4) of the Act of 1944 a question of entitlement to compensation is to be determined as in the case of a claim under section 9(1) of the Act of 1931. Section 9(4) contains the provisions for arbitration. In section 6(7) of the Act of 1944 there is specific reference to section 10 of the Act of 1931, applying thereby section 10(2) to interim planning. But

[1] [1959] Ch. 543; [1958] 1 W.L.R. 1161; [1958] 3 All E.R. 521.

if the respondents were right the absence of a scheme would bar a claim.

As to whether the evidence here was sufficient to satisfy section 10(2), see section 3 of the Ministries of Northern Ireland Act (Northern Ireland), 1921. The relevant Ministry is now the Ministry of Health and Local Government: see section 1 of the Ministries Act (Northern Ireland), 1944. The evidence of Mr. Fitzgerald was sufficient as to what the Ministry considered reasonable "having regard "to the nature and situation of the land affected." There was in evidence a map which showed the nature and situation of the land, and the reasons given for the refusal of the application showed the relation of the particular to the general.

As to the final question relating to the Government of Ireland Act, 1920, that Act, by section 76(2), repealed the Government of Ireland Act, 1914. In the Act of 1914 the corresponding section to section 5(1) of the Act of 1920 is section 3, which does not contain the words "or take any property without compensation." To "take" property means to acquire property. The design was to provide a constitution for both Southern Ireland and Northern Ireland and to continue existing laws. The method was to confer legislative powers on their legislatures in the widest terms, while indicating certain prohibited matters: see sections 4, 5, 61, 64 and 65. There is no general declaration of fundamental rights, free speech, assembly, religion, though these are found in articles 6 to 9 of the Constitution of the Irish Free State (Saorstat Eireann) Act, 1922, The Constitution of Northern Ireland is sui generis and unlike any other constitution, either that of Eire or of any of the Dominions.

The meaning of the relevant phrase in section 5(1) of the Act of 1920 "or take any property without compensation" should be confined to that which it would have borne in 1920.

As to the construction of Dominion constitutions, see *Croft v. Dunphy*[1] and *Edwards v. Attorney-General for Canada*[2].

If by-laws are reasonable they are valid, even if they seriously restrict the user of property without compensation: see *Slattery v. Naylor*[3]. The Irish Free State (Agreement) Act, 1922, the Irish Free State Constitution Act, 1922, and the Irish Free State (Consequential Provisions) Act, 1922, followed upon the Treaty of 1921. By the last Act the Government of Ireland Act, 1920, was confirmed in relation

[1] [1933] A.C. 156 (P.C.); 48 T.L.R. 652.

[2] [1930] A.C. 124, 136-137 (P.C.); 46 T.L.R. 4.

[3] (1888) 13 App. Cas. 446, 449 (P.C.); 4 T.L.R. 426.

to Northern Ireland. If the effect of the inclusion of the words "or "take any property without compensation" means that a vast sphere of regulatory legislation is to be closed, it would be extraordinary to find such a result achieved by so slight an enactment.

The report of the Committee on Compensation and Betterment (1942, Cmd. 6386) indicates in paragraphs 32 et seq. the trend of legislation in relation to compensation.

At common law, where there was no surrender of land or property to the State, no taking over of the property or putting it at the disposal of the State, no actionable injury and no right to compensation arose. There was no compensation where the land was not taken or physically invaded. So there was no compensation for the sort of interference complained of in the present case. "Injurious affection" has never had the meaning for which the respondents contend. The principles relevant to the right to compensation were stated in *Caledonian Railway Co. v. Walter's Trustees*[1]. See also the compensation provisions in sections 1, 9, 18 and 49 of the Lands Clauses Consolidation Act, 1845. There is a contrast between the situation as regards injurious affection when lands are taken and when they are not taken. At the time of the Act of 1920 compensatable matter did not go beyond compulsory acquisition of land or its physical invasion or injurious affection in the very limited sense in which it was understood under the Act of 1845. That was the right to compensation which was carried into the new Constitution of Northern Ireland. The field of legislation would be unlikely to be restricted in the way suggested by the respondents. In sections 3 and 42 of the Government of Ireland Act, 1914, no distinction appears to be drawn between the expressions "divert" and "take" in the conceptions which they express. The essence of "injurious affection" is that a man is left with his property, though diminished in value. "Indirect" taking cannot have a different effect from "direct" taking; the final result must be a transfer. The court is not concerned with indirect consequences. To "take" must mean to "acquire," and that indicates the meaning of the expression "directly or indirectly." What cannot be lawfully accomplished by direct means cannot lawfully be accomplished by indirect means, and that principle is reflected in the words of section 5 of the Act of 1920 which recognise it and add nothing beyond indicating that the Act is not to be circumscribed. In the Act of 1914 the word "property" was used only in the sense of what can be taken for public utility purposes. It is not used as equivalent to the right

[1] (1882) 7 App. Cas. 259, 276 (H.L.).

of ownership and it is not to be given a different or wider meaning here. If "property" means a bundle of rights, each individual element in that bundle is not "property," a word which only applies to the aggregation of rights. Further, these words may refer simply to the property of religious denominations.

If the appellants' argument is right so far, the true decision of this case is confined to determining the meaning of the words "take any "property." The appellants' construction would give the legislature comparative freedom and would preserve the subject from loss, giving "property" the meaning submitted, that is, the general sense, so that it refers to the object of ownership and is not the equivalent of property in an object or the right of ownership to it. The Act of 1920 stabilised the position as it existed at that date.

On the question whether the words in section 5(1) are confined to the property of religious bodies, *O'Neill v. Northern Ireland Road Transport Board*[1] was wrongly decided.

On the meaning of "taking," the appellants rely on *Northern Ireland Transport Board v. Benson*[2]. *Ulster Transport Authority v. James Brown & Sons Ltd.*[3] proceeds on a wrong basis as to the meaning of "taking."

Maurice Gibson Q.C. following. Even if the House rejects the contention that the taking of property means only the acquisition of property, so that it is held that to "take" is wider than to "acquire," it will yet fall short of mere interference with the property. Whatever meaning be placed on the words "take property without compensa- "tion," they cannot, if the Act is to work at all, be given an unlimited meaning. Thus the imposition of a fine is a taking of property, and so is taxation, such as estate duty. One must put some limitation on this phrase in so far as it is contained in a prohibition which involves the conception that the property referred to is property for which compensation should be paid if it is taken. The dividing line is that which lies between regulation and confiscation.

Life in an organised polity involves social habits and men who live within it must give up anti-social behaviour, either voluntarily or under compulsion through the criminal law. So, too, in the use of his property a man may be similarly restrained without compensation. Restrictions on the use of his property make a man do under compulsion what he should do voluntarily; a landlord may be prevented

[1] [1938] N.I. 104, 115-116.
[2] [1940] N.I. 133, 145-147, 155-156, 170.
[3] [1953] N.I. 79, 113-114, 116, 117, 121, 126.

from overcrowding his house or forced to provide proper sanitation. The difficulty of drawing the line does not invalidate the distinction.

The principal planning Act here is the Act of 1931. Section 5 deals with the subject-matter described in section 10(2). See also section 9(1). The question arises whether under this regulating provision there is a liability in the particular case of this particular site to pay compensation.

In the abstract a regulating provision imposed on a landowner benefits him, too, because his neighbours are also submitting to similar restrictions, and that would call for no compensation. It is different from confiscation.

To "take" imports a specific transaction. Some other transaction, even though it may have a similar effect to the owner of the land, cannot be treated as a taking. The test is whether the Act is directed to obtaining the public good, advancing public amenity or reducing public evil, or whether, by contrast, it is really confiscatory. By "public good' is meant peace, order and good government. When an Act vests in the Ministry the discretion to determine whether or not a certain restriction should be imposed, the test is the same. Provided the discretion is defined by reference to the objects of the Act, it is valid. *Hughes and Vale Proprietary Ltd. v. New South Wales*[1] applies to this case. Prima facie this scheme is valid. The discretion vested in the Ministry is regulatory. The Ministry is directed what it is to consider. The function of the Ministry is entirely different from that of the courts. The function of the court is to decide whether the powers conferred on the Ministry are intra vires the Act. The function of the Ministry is to act within the vires validly conferred. Provided that the Ministry acts within the requirements of section 10(2), it is acting within a validly delegated function and the courts have no say in the matter. The discretion vested in the Ministry is not arbitrary but must be exercised on planning principles in the public interest. Its power to declare on the reasonableness of the provisions of a planning scheme is an administrative function. There is no ouster of the jurisdiction of the courts, because the jurisdiction of the courts to adjudicate on the validity of the legislation is not excluded. Even if section 10(2) has the effect of vesting in the Ministry the power of determining whether property may be taken without compensation to the exclusion of the courts, it is by virtue of the existence of the words "and which the "Ministry, having regard to the nature and situation of the land "affected by the provisions, considers reasonable for the purpose."

[1] [1955] A.C. 241 (P.C.); [1954] 3 W.L.R. 824; [1954] 3 All E.R. 607.

and these words are severable from the rest of the subsection, so that they alone are void as being ultra vires the legislature.

W. B. Maginess Q.C., Attorney-General for Northern Ireland, C. A. Nicholson Q.C. and *J. K. Pringle* (all of the Bar of Northern Ireland) as amici curiae. This case is important to the Government of Northern Ireland in relation to the general powers of Parliament. The decision will be applicable to many Acts of Parliament.

The question of taking property without compensation has been before the courts in Northern Ireland: see *Northern Ireland Transport Board v. Benson*.[1] Till now it has not been held that the "taking" of property meant more than its acquisition. If the Northern Ireland Acts were construed so widely that any interference with the rights of property must be accompanied by compensation a difficulty would be created. In *France Fenwick & Co. Ltd. v. The King*[2] the court distinguished between an act of direction in unloading a cargo and a mere prohibition.

Under section 4 of the Government of Ireland Act, 1920, legislative powers are given to the Parliament of Northern Ireland subject to certain limitations. So long as it keeps within its own field it is the master. Section 5 must be construed in the light of the powers given by section 4. As to the construction of such Acts, see *Edwards v. Attorney-General for Canada*[3]. The powers of the Northern Ireland Parliament should be construed widely so as to make it master in its own house. See the restrictions imposed by the Intoxicating Liquor Act (Northern Ireland), 1923. Such Acts are restrictive but are passed for the maintenance of peace, order and good government. See also the Agriculture Act (Northern Ireland), 1949.

To construe the word "take" in section 5 of the Act of 1920 one must look first at that section itself and then read it in conjunction with section 4. "Take" means acquisition or entering into possession or a transfer from the owner to some other person. It does not cover restricting the user of land.

If possible a construction should be given to the words which would avoid holding the legislation to be ultra vires: see *Robb v. Electricity Board of Northern Ireland*[4]. The "pith and substance" of the legislation should be looked at: *Govindan Sellappah Nayar Kodakan Pillai v. Punchi Banda Mudanayake*[5].

[1] [1940] N.I. 133, 156-157, 173.
[2] [1927] 1 K.B. 458; 43 T.L.R. 18.
[3] [1930] A.C. 124, 136.
[4] [1937] N.I. 103, 125.
[5] [1953] A.C. 514, 520 (P.C.); [1953] 2 W.L.R. 1142.

The onus is on the respondents to show that section 10(2) of the Act of 1931 was enacted as part of a plan to take property without compensation.

In order to render such legislation ultra vires there must be an infringement of some right which, detached from the physical property, is of value and can be disposed of: see *Chiranjit Lal Chowdhury v. Union of India*[1]. But the right to build on one's land is not absolute at common law and is subject to the principle sic utere tuo ut alienum non laedas. Those entrusted with planning restrictions have the right to guard the good of the community, which varies from time to time and from place to place. Any person owning property must so use it as not to offend against the general good. Here the general good has been defined by the scheme, and to build in contravention of it would offend against the principle sic utere tuo ut alienum non laedas. There can be no compensation for a restriction on the use of property which prevents an owner from hurting his neighbours. *Slattery v. Naylor*[2] goes further than the present case: see also *Russell v. The Queen*[3].

The decisions of the courts in the United States recognise the distinction which has been suggested in relation to sections 4 and 5 of the Act of 1920: see *Commonwealth v. Alger*[4]; *Mugler v. Kansas State*[5]; *Transportation Co. v. Chicago*[6]; *Walsh v. Swasey*[7]; *Village of Euclid v. Ambler Realty Co.*[8] and *United States v. Causby*[9].

The expression "take" was used in Acts of Parliament long before 1920: see the Lands Clauses Consolidation Act, 1845. The expression "injurious affection" was also used. "Take" means "acquire." "Injurious affection" means that there was no acquisition but that the lands were affected.

The test should be: Are the restrictions imposed clearly arbitrary and unreasonable? Here they are not.

C. A. Nicholson Q.C. following. The conclusion of Lord MacDermott C.J. in the Court of Appeal rested largely on his reading of the American cases. But the Fifth Amendment of the United States Constitution and the Fourteenth Amendment have produced two lines of cases. The former provided that "private property" shall not "be taken for public use without just compensation," and the first

1 [1950] S.C.R. (India) 869.
2 13 App. Cas. 446, 449.
3 (1882) 7 App. Cas. 829 (P.C.).
4 (1851) 7 Cush. 53, 84-85.
5 (1887) 123 U.S. 623, 666-667.
6 (1829) 99 U.S. 635, 639-640.
7 (1908) 214 U.S. 91.
8 (1920) 272 U.S. 365.
9 (1946) 328 U.S. 256, 258.

line of cases, dealing with the meaning of the word "taken," ended with *United States v. Causby*[1]. The latter forbade the State to "deprive any person of life, liberty, or property, without due process "of law." The *Causby*[2] line of cases might be relied on in connection with section 5 of the Act of 1920, but the other line of cases is dealing with the question whether a particular person has been deprived of his property without due process of law: see *Pennsylvania Coal Co. v. Mahon*[3].

Section 51 (xxxi) of the Constitution of the Commonwealth of Australia empowers Parliament to make laws for the peace, order and good government of the Commonwealth with respect to "the acquisi- "tion of property on just terms." It is part of the enabling provisions and they should be given a benevolent construction, while in the case of a restricting provision the approach should be the reverse.

The word "take" in section 5 of the Act of 1920 is more closely related to the use of the verb in the Fifth Amendment than to the Australian provision.

As to the Australian authorities, see Wynes on Legislation and Executive Powers in Australia, 2nd ed., p. 463, and *Minister of State for the Army v. Dalziel*.[4] That case does not go the whole length of establishing that a mere right of enjoyment in property (such as a man's right to build his house 10 feet higher) is such a right as the respondents contend. Mere enjoyments are not property in this context. See also *Bank of New South Wales v. The Commonwealth*[5] and *Australasian United Steam Navigation Co. Ltd. v. Shipping Control Board*[6].

It is impossible that "take" in section 5 of the Act of 1920 should mean anything but "appropriate" or "acquire." A single formula could not cover a case of this sort, and it would be extraordinary if the phrase in the Act were used to apply to all cases of restriction. When a Parliament was set up with the wide words used in section 4 such an intention could not have been present.

In Canada a conflict arose between the powers of the Federal Parliament to make laws conferred by section 91 of the British North America Act, 1867, and the exclusive powers of the provincial legislatures; the solution was found in the test of the "pith and "substance" of the enactment: see *Gallagher v. Lynn*[7].

1 328 U.S. 256, 264-265, 269.
2 328 U.S. 256.
3 (1922) 260 U.S. 393, 412, 415.
4 (1944) 68 C.L.R. 261, 283-284, 290.
5 (1948) 76 C.L.R. 1, 348-350.
6 (1945) 71 C.L.R. 508, 524-526.
7 [1937] A.C. 863, 870 (H.L.); 53 T.L.R. 929; [1937] 3 All E.R. 598.

If the alleged taking, whether it be by way of appropriation or restriction, be for some good reason connected with the property, it is not a "taking" within section 5(1) of the Act of 1920, which imports a naked taking—a taking for taking's sake.

All difficulty is avoided if "take" is construed as meaning "acquire" in contrast to "injurious affection" in compensation law. The acceptance of a wider meaning comparable to "deprive" in the Fourteenth Amendment raises the conflict with the power to make laws for peace, order and good government and opens the door to something very like censorship of legislation, a thing foreign to all the ideas which have hitherto prevailed both with regard to our own laws and with regard to those of the great Dominions: see *Riel v. The Queen*[1].

The well-known principle that an Act is not to be read as denying compensation to a subject whose property has been interfered with has never been held to apply to restrictions imposed by regulatory legislation and is applicable only in cases of expropriation or physical interference which would otherwise give rise to an actionable wrong. The phrase "take away property without compensation" should be read as co-extensive with this principle.

Central Control Board (Liquor Traffic) v. Cannon Brewery Co. Ltd.[2] and *Attorney-General v. De Keyser's Royal Hotel Ltd.*[3] deal with expropriation. See also *Newcastle Breweries Ltd. v. The King*[4] and *In re an Arbitration between Ellis and Ruislip-Northwood Urban District Council*[5]. A mere negative prohibition does not come within this sphere: *France Fenwick & Co. Ltd. v. The King*[6]. Everyone suffers some restrictions in the use of his property and it is held subject to the general law.

In *O'Neill v. Northern Ireland Road Transport Board*[7] it was held that since in section 64(1) of the Act of 1920, affording protection to the universities in language similar to that of section 5(1), the words "or take any property without compensation" were not used, these words in section 5(1) were intended to have a wider application and to produce an additional meaning. But if "take" means "acquire," the words give no greater protection than the words which precede them. In both sections the taking of property refers to the taking of property by compulsory acquisition.

1 (1885) 10 App. Cas. 675 (P.C.).
2 [1919] A.C. 744, 752, 754, 760, 763 (H.L.); 35 T.L.R. 552.
3 [1920] A.C. 508, 528-529, 568, 579 (H.L.); 36 T.L.R. 600.
4 [1920] 1 K.B. 854, 866; 36 T.L.R. 276.
5 [1920] 1 K.B. 343 (C.A.); 35 T.L.R. 673.
6 [1927] 1 K.B. 458.
7 [1938] N.I. 104, 116.

As to questions of degree, see *Hughes and Vale Proprietary Ltd. v. State of New South Wales*[1]. In such cases the question is as to the true nature and character of the legislation and whether or not it is confiscatory: see *Gallagher v. Lynn*[2]. In some cases where there is a certain element of sacrifice by a citizen of his property in the public weal compensation may put him back where he was. But where the Act is regulatory, and there is at least a degree of sacrifice that the citizen should make, that is not truly compensatable.

The phrase to be construed here is a composite one and is not to be elucidated by taking it to pieces: *Vitkovice Horni a Hutni Tezirstvo v. Korner*[3].

W. F. Patton Q.C., *R. L. E. Lowry Q.C.* and *R. W. B. McConnell* (all of the Bar of Northern Ireland) for the respondent company. Two questions arise for the decision of the House on the construction of two separate sections in two separate Acts of Parliament. The mode of construction is well known in law. There is no need to apply the particular methods of construction alleged to be appropriate to the construction of constitutional Acts.

Section 5 of the Act of 1920 is not unique in constitutional Acts. The Parliament at Westminster has overriding powers over Northern Ireland, and the powers of the Parliament of Northern Ireland are superimposed in respect of the subjects mentioned in section 4, but the Westminster Parliament could legislate on the same subjects. If anything cannot be done in Northern Ireland, it can be done at Westminster: see section 2(1) and (2) of the Northern Ireland Act, 1947.

The words used here are as strong as those in the Australian Constitution and reliance is placed on the judgment in *Minister of State for the Army v. Dalziel*[4]. The respondents rest their case on it. The words "the acquisition of property on just terms" in section 51 (xxxi) of the Australian Constitution are very similar to those in the relevant Act, where the words are just as strong. On the judgment in the Australian case the respondents must succeed. It recognises that property includes jus in re aliena, for example, a right of way over A's land, and taking such a right of way from a man is taking his property. When a local authority takes property by a vesting order, the property vests in it free of all charges, rights of way and other burdens, and if X has a right of way over such land and the right of

1 [1955] A.C. 241, 290, 293 (P.C.).
2 [1937] A.C. 863, 870.
3 [1951] A.C. 869, 883; [1951] 2 T.L.R. 188; [1951] 2 All E.R. 334.
4 68 C.L.R. 261, 272, 277-278, 279, 280, 281, 282, 286, 290, 293-294, 295, 301, 309.

way disappears so that X has lost it, that is a taking of property. The Australian case recognises that the right of occupation and user of land is property and that property can be something less than the whole bundle of rights connected with the physical entity.

If an Act creates the opportunity for a person who exercises a power to go wrong, that Act is bad. One does not have to wait until someone actually goes wrong in its exercise. It is the creation of the power and not its exercise which is the subject of objection: see *Ottawa Separate Schools Trustees v. Mackell*[1].

The words of section 5(1) of the Act of 1920 are not confined to the property of religious bodies: see *O'Neill v. Northern Ireland Road Transport Board*[2]. As to the meaning of "taking," *Ulster Transport Authority v. James Brown & Sons Ltd.*[3] proceeds on the right basis and is relied on. The words "or take any property without compensation" found in section 5(1) of the Act of 1920, but not in section 3 (the corresponding section) in the Government of Ireland Act, 1914, must be given some meaning. The property taken is not confined to tangible property but may include such property as goodwill: see Williams on Real Property, 25th ed., pp. 3-4, and *Gough's Garages Ltd. v. Pugsley*[4]. In this case the right to build on the land is something which could have been sold.

In the phrase "take any property without compensation" the word "property" does not include money, for to give compensation for taking money would merely be to give back what had been taken, and therefore the phrase, so interpreted, would amount to a prohibition from taking: see section 16 of the Government of Ireland Act, 1920, dealing with taxation. Parliament can clearly impose fines or taxation. Thus, "property" means proprietary rights other than money.

Section 5(1) begins: "In the exercise of their power to make "laws....." The appellants have read the subsection as though it prohibited the doing of certain acts, whereas it prohibits the passing of certain laws. The question to be asked is what could be done under those laws. If the prohibition in the subsection is transgressed, the law is void. The kind of laws which are prohibited are laws which would have an effect "so as to" produce certain effects. The words indicate the effect of the laws and not the intentions of the persons making them. The word "take" has an extremely wide meaning. It is a verb with many uses, e.g., "take a drink," "take a seat" and "take a "train." One can look at taking either from the point of view of the

[1] [1917] A.C. 76, 81 (P.C.); 33 T.L.R. 41.
[2] [1938] N.I. 104.
[3] [1953] N.I. 79.
[4] [1930] 1 K.B. 615, 620-621 (C.A.); 46 T.L.R. 283.

recipient or from that of the person who loses the thing taken. In this subsection "take" might either mean "take from" or "acquire." But the latter meaning would not fit in with the grammar and sense of what has gone before. Parliament cannot acquire things. It is not a body corporate. It can only pass laws. The Crown or a Ministry can acquire property, but not Parliament. The word "take" must be looked at from the point of view of the "takee." Here it must mean "take from." It is connected with the words "without compensation." To "take without compensation" means to "expropriate" or "confiscate." The words "directly or indirectly" mean "directly or "obliquely," not simply directly or by an agent.

It was argued on the authority of the *Pillai* case[1] that the "pith and "substance" principle must be applied in such a case as this, but if that is what the Privy Council meant, that case stands alone. It is not applicable to a section like section 5. Here the question is whether or not there is a taking. The Act challenged in the Privy Council case was on its face a good Act, but in the present case the enactment is bad because it deprives persons of property without compensation: see also *Hughes and Vale Proprietary Ltd. v. New South Wales*[2]. The "pith and substance" principle is applicable to section 4 of the Act of 1920 but not to section 5. In the Planning and Housing Act (Northern Ireland), 1951, there would be no right to compensation but for section 9(1). That saves the Act which, but for that section, would be bad. Section 10(2) of that Act, which takes away the compensation given by section 9, is bad. It is not contended that any part of the Act is bad but section 10. There is a wide definition of "land" in section 12(2) of the Acquisition of Land (Assessment of Compensation) Act, 1919.

Parliament will not be presumed to intend to take away property without compensation. This will influence the courts in their interpretation of Acts of Parliament to the point that they will refuse to credit the legislature with such an intention unless the words used are clear and unassailable; though if Parliament expresses such an intention clearly, the courts must, of course, give effect to it. A subordinate Parliament, like that of Northern Ireland, is not to have the power to take property without compensation: see *Attorney-General v. Horner*[3]; *London and North Western Railway Co. v. Evans*[4]; *Newcastle Breweries Ltd. v. The King*[5]; *In re an Arbitration between Ellis*

1 [1953] A.C. 514, 528-529.
2 [1955] A.C. 241, 293, 295.
3 (1884) 14 Q.B.D. 245, 256-257 (C.A.); 1 T.L.R. 28.
4 [1893] 1 Ch. 16, 28-29 (C.A.); 9 T.L.R. 50.
5 [1920] 1 K.B. 854, 865-866.

and Ruislip-Northwood Urban District Council[1] and *Bond v. Nottingham Corporation*[2]. The abhorrence of confiscation is such that extreme measures will be taken to avoid it. A decision in the respondents' favour might result in the invalidation of other Acts of Parliament the validity of which has been hitherto unchallenged.

In considering section 6(4) of the Act of 1944, adequate weight was not given in the court below to the principles just stated. One is not justified in holding that it incorporated section 10(2) of the Act of 1931. Section 6(4) incorporated only those provisions of the Act of 1931 which related to injurious affection; it did not incorporate those provisions which related to what was not injurious affection. Section 10(2) does not define injurious affection. In effect section 6(4) is saying: "Make the assumption that there is injurious affection and "give the compensation which would have been given under the "principal Act." To make section 10(2) of the Act of 1931 operate, it must be assumed that a scheme exists, whereas the wording of section 6(4) of the Act of 1944 makes the assumption that a scheme does not exist. It is not necessary to import the provisions of section 10(2) into a section which deals with interim development applications. The right principle to apply to the construction of section 6(4) is that, since specific reference has been made to all the other provisions in the Act of 1931 relevant to the question of compensation in the circumstances, the omission of any reference to section 10(2) must be taken as excluding it.

Section 10(2) of the Act of 1931 is inappropriate to dealing with interim development. In the case of interim development there is no scheme. If section 6(4) of the Act of 1944 was to incorporate it, one would have expected the draftsman of the Act to devise some adaptation to make its incorporation work.

Until there is in operation a planning scheme in the proper sense the Ministry cannot form or express a view as required by section 10(2). Section 2(3) of the Ministries of Northern Ireland Act (Northern Ireland), 1921, prescribes the manner in which Ministries are to act. There is no justification for proof of the Ministry's views by way of hearsay evidence such as that of Mr. Fitzgerald. In the case of section 10(2) what is envisaged is something like a certificate. Where there is no planning scheme the Ministry cannot refer to it as required by the subsection. The refusal of an application for interim develop-

[1] [1920] 1 K.B. 345, 361-362.

[2] [1939] Ch. 847, 856; 55 T.L.R. 856; [1939] 2 All E.R. 610; [1940] Ch. 429, 435 (C.A.); 56 T.L.R. 475; [1940] 2 All E.R. 12.

ment is not part of a planning scheme. If the appellants were right, the Ministry would have to certify that the refusal was reasonable for the purposes of a planning scheme which did not exist. The court must take the words of an Act of Parliament as they are and not change words which seem inappropriate: see *Brophy v. Attorney-General of Manitoba*[1].

Section 6(7) of the Act of 1944 refers to section 10 of the principal Act, which indicates that the draftsman was aware that section 10(2) as it stood had to be altered if it was to be made to apply. The position is that it was to operate as it had previously operated, but not for the purposes of the Act of 1944. This reference to sections 9 and 10 of the Act of 1931 in section 6(7) of the Act of 1944 does not by implication cause section 10(2) to apply to an interim development application. There is a proviso to section 10(2) which refers (inter alia) to "the demolition, removal or alteration, in pursuance of a planning "scheme, of any building (*a*) existing at the date of the prescribed "notice of the passing of the resolution of the local authority to "prepare or adopt the scheme . . ." Section 6(7) of the Act of 1944 was necessary to meet the situation created by section 1(1) of that Act. A new means of defining the date for the purposes of the proviso to section 10(2) had to be substituted for "the date of the prescribed "notice."

R. L. E. Lowry Q.C. following. The American cases cited by the Attorney-General may prove to be like dangerous animals which, once turned loose, devour their master. The use of the verb "take" in the Fifth Amendment to the United States Constitution is narrower than in section 5 of the Act of 1920; it is contrasted with the use of the verb "deprive" in the Fourteenth Amendment. In *United States v. General Motors Corporation*[2] the court treated the word "taken" as relating to "the right to possess, use and dispose of" a physical thing. *Mugler v. Kansas State*[3] shows that the word "take" is not to be given a narrow meaning even when associated with such words as "for the "public use."

When considering "the power of the State, sometimes termed its "police power, to prescribe regulations to promote the health, peace, "morals, education and good order of the people," the test of reasonableness may be applied: see *Mugler's* case[4] and *Springer v. Government of the Philippine Islands*[5]. In this connection one must contrast the constitutional background of the United States and of

1 [1895] A.C. 202, 215 (P.C.); 11 T.L.R. 198.
2 (1945) 323 U.S. 373, 377-378.
3 123 U.S. 623, 667-668.
4 Ibid. 663-665.
5 (1927) 277 U.S. 189, 209-210.

Northern Ireland. In the former the constitution was adopted; in the latter it was imposed from without. In the former case there is a power to alter the constitution including the police powers, but not in the latter. Here reasonableness is not the final test. Reasonableness will not make valid a taking which is already forbidden: see *Slattery v. Naylor*.[1]

United States v. Causby[2] makes it clear that if most of the enjoyment of land is taken, leaving only some of its value, there is a taking for the purposes of the Fifth Amendment, although there is not an actual taking over.

Section 10(2) of the Act of 1931 affects the property in a general sense. The right to build on one's land is property; it is one of a bundle of rights. It is also "property" in the sense of section 5 of the Act of 1920. All definitions of "property" in enactments concerned with compensation recognise a wide meaning of the expression. The ordinary principle of English law that one must not interfere with the rights of others does not draw distinctions between taking over their property and other forms of injury: see *Central Control Board (Liquor Traffic) v. Cannon Brewery Co. Ltd.*[3] and *Attorney-General v. Horner*[4]. By 1920 there was a general notion that compensation should be paid when property was taken. To restrict the use of property in the hands of the owner is, to that extent, a taking of it in the sense of depriving him of its use; it amounts to taking away a part.

When the Government of Ireland Act, 1920, was passed Ireland was going to be given two Parliaments and provision had to be made for all kinds of things which in ordinary life in England would not have to be considered. Thus section 4 was qualified by section 5 which imposed limits for the protection of individuals and which is apt to give more protection than the relevant sections in the Government of Ireland Act, 1914, and the Irish Free State (Agreement) Act, 1922. Even if the word "land" had been used at the end of section 5, that would have been enough for the respondents' purposes. If the legislature had so intended, it would have made it clear that the words "take any property" were being used in a narrow sense. There is here a conflict of ideas, but it should be resolved in favour of the wider meaning. The respondents adopt what was said as to "pith and "substance" in *Northern Ireland Road Transport Board v. Benson*[5].

It is admitted that, if the respondents are right, other Northern Ireland Acts may be ultra vires, but Westminster can legislate.

[1] 13 App. Cas. 446.
[2] 328 U.S. 256, 261-262.
[3] [1919] A.C. 744.
[4] 14 Q.B.D. 245.
[5] [1940] N.I. 133, 141.

Section 10(2) of the Act of 1931 creates a situation where compensation may be precluded in respect of something which is a taking away: see *Ulster Transport Authority v. James Brown & Sons Ltd.*[1]; *Ottawa Separate Schools Trustees v. Ottawa Corporation*[2]; *Minister of State for the Army v. Dalziel*[3] and *Hughes and Vale Proprietary Ltd. v. New South Wales*[4]. Here the appellants are claiming that the Northern Ireland Parliament can delegate to a subordinate authority the power to do something which would be wrong if that Parliament were to do it itself. A section which permits a subordinate authority to take without compensation is itself ultra vires.

Each constitution must be regarded on its own terms. *Croft v. Dunphy*[5] shows how different the situation may be under different constitutions. That of Northern Ireland is not the same as that of Canada or Australia. Northern Ireland may be regarded as a division in one country. The Westminster Parliament not only has a dominating role but also contains members from the subordinate territory. Against this background, types of legislation which might otherwise be reasonable are forbidden.

Judicial decisions have ruled against the taking of property without compensation unless the words of the Act of Parliament relied on are plain. *Dalziel's* case[3] avoids pedantic distinctions in the use of terms like "take." If there is sufficient interference with the land of another, that may virtually be a taking: see *Causby's* case[6]. From the owner's point of view a great enough interference will amount to an acquisition.

Section 10(2) refers to provisions inserted in a planning scheme and it cannot apply unless a planning scheme exists. No planning scheme is deemed to exist, although a resolution to prepare a scheme is deemed to have been passed. While the reasons for refusal of development permission are apparently relied on by the appellants as the equivalent of provisions in a planning scheme, those reasons are nowhere deemed to be the provisions in a planning scheme. To make the subsection work, one must assume that a scheme exists, whereas the wording of section 6(4) of the Act of 1944 clearly assumes the contrary. Sections 4 and 9(5) of the Act of 1931 indicate that the legislature was aware of the difficulty which would arise where a planning scheme did not actually exist and had previously adopted an expedient for dealing with that difficulty. Section 4 was repealed

1 [1953] N.I. 79, 126.
2 [1917] A.C. 76, 81.
3 68 C.L.R. 261.
4 [1953] A.C. 241, 306-307
5 [1933] A.C. 156.
6 328 U.S. 256.

by section 2(10) of the Act of 1944 and no similar provision has been enacted.

It is not strange if a different result is achieved here from the result where there is a planning scheme. Objection can be made to a planning scheme by those concerned, while in the case of interim development there has never been a chance of making representations.

The evidence of Mr. Fitzgerald shows that the Ministry were not, and could not have been, considering "provisions inserted in a "planning scheme."

Further, Mr. Fitzgerald has not given the required evidence under section 10(2) in an acceptable form, so that, even if the respondents are wrong on the other points of the case, his evidence has not cut them off from the right to compensation.

The respondents' case rests on the principle that property should not be taken away or interfered with without compensation: see Blackstone's Commentaries (1765 ed.), vol. I, p. 135.

F. A. L. Harrison Q.C. in reply. The question whether stripping an owner of all rights of user, so that he was left with no practical use of his property, would amount to a taking does not arise in this case and the appellants do not wish to argue the extreme point.

The Act of 1920 cannot have been passed with the intention of restricting the Northern Ireland Parliament, so that local authorities acting under powers conferred on them before 1920 could regulate the use of property without paying compensation, but acting under powers conferred after 1920 could only regulate property in precisely similar circumstances if they paid compensation. The power to regulate the use of land does not, of course, include the power to prohibit its use entirely.

Dalziel's case[1], relied on by the respondents, does not go so far as to say that the taking of a particular right to use land is a taking. It must be read with *Australasian United Steam Navigation Co. Ltd. v. Shipping Control Board*[2]. See also *Ottawa Separate Schools Trustees v. Ottawa Corporation*[3] and *Hughes and Vale Proprietary Ltd. v. New South Wales*[4].

The fact that a delegatee may abuse his powers does not affect the validity of the enactment under which he acts. When powers are such that they may be exercised either lawfully or unlawfully, lawful exercise is presumed. Unless the delegatee abuses his powers there is no room for the interference of the court.

1 68 C.L.R. 261, 309.
2 71 C.L.R. 508.
3 [1917] A.C. 76, 79.
4 [1955] A.C. 241, 306.

As to compensation for injurious affection under the Lands Clauses Act, see Halsbury's Laws of England, 3rd ed., vol. X, pp. 8-10, paras. 7 and 8, and p. 155, para. 270. If the respondents are right in their contention of section 5 of the Act of 1920, the compensation which the Northern Ireland Parliament would have to enact in Lands Clauses Act cases would have to go beyond that which that Act itself requires.

In sections 9(1) and 10(2) of the Act of 1931 the expression "injuriously affected" does not have a meaning equivalent to damnum. Its meaning must be collected from the Act, and that meaning is cut down by exceptions. By section 10(2) there is excluded from the category of injurious affection loss sustained by reason of the coming into operation of any provisions in a planning scheme which prescribe the height, character or use of buildings and which the Ministry considers reasonable for the purpose.

The latter condition was established by the evidence of Mr. Fitzgerald.

"Taking" has the same meaning as dispossessing and has nothing to do with injurious affection. In "taking" there is no room for any shades of meaning. Something very like a taking is not a taking. If some question of degree is involved, any test of degree must be capable of a wide, simple application. The criterion might be that section 5 strikes at such takings of property as are not merely regulatory.

W. B. Maginess Q.C., Attorney-General for Northern Ireland. As to the evidence, the matter should either be left as it is or else a certificate under section 3(1) of the Ministries of Northern Ireland Act (Northern Ireland), 1921, should be given.

As to the meaning of "directly or indirectly," a transfer of property from one person to another is direct, while, if an agency is employed, it is indirect.

To establish invalidity here it would have to be shown that while purporting to exercise a regulatory power the action of the authority was in a real sense confiscatory.

When a power to regulate is conferred which may be abused, the court will not presume that it will be arbitrarily exercised, and to confer such a power is not invalid: see *Lieberman v. Van de Carr*[1].

Their Lordships took time for consideration.

[1] (1905) 199 U.S. 552, 562.

Dec. 14. VISCOUNT SIMONDS stated the facts and the two questions posed by the arbitrator, and continued: My Lords, the second question must appear at the present stage of my narrative somewhat cryptic. It is, in my opinion, of a formal character, and I will defer consideration of it until I have disposed of the important matters that arise under the first question. These are, first, a question arising on the construction of the Act of 1944, viz., whether section 6(4) of that Act incorporates a reference to section 10(2) of the Act of 1931 as well as to the compensatory provisions of section 9, and secondly, whether section 10(2) is a valid enactment having regard to the provisions of section 5 of the Government of Ireland Act, 1920. The far-reaching importance of the second question is obvious.

My Lords, upon the first of these questions I entertain no doubt, and I cannot state the answer to it in a manner more clear and comprehensive than the learned Lord Chief Justice has done. Section 6(4) of the later Act does incorporate section 10(2) of the earlier Act. I will not occupy your Lordships' time by further reference to it.

Upon the second question, viz., the constitutional validity of section 10(2) of the Act of 1931, I must say something more. For, though I agree with much that the Lord Chief Justice has said on this topic, there comes a point at which I must with great respect diverge from him.

The issue turns on the true meaning and effect of section 5 of the Government of Ireland Act, 1920. Subsection (1) of that section is as follows: "In the exercise of their power to make laws under this Act "neither the Parliament of Southern Ireland nor the Parliament of "Northern Ireland shall make a law so as either directly or indirectly "to establish or endow any religion, or prohibit or restrict the free "exercise thereof, or give a preference, privilege, or advantage, or "impose any disability or disadvantage, on account of religious belief "or religious or ecclesiastical status, or make any religious belief or "religious ceremony a condition of the validity of any marriage or "affect prejudically the right of any child to attend a school receiving "public money without attending the religious instruction at that "school, or alter the constitution of any religious body except where "the alteration is approved on behalf of the religious body by the "governing body thereof, or divert from any religious denomination "the fabric of cathedral churches, or, except for the purpose of roads, "railways, lighting, water, or drainage works, or other works of "public utility upon payment of compensation, any other property, "or take any property without compensation.

"Any law in contravention of the restrictions imposed by this "subsection shall, so far as it contravenes those restrictions, be void."

It was first urged on behalf of the appellants that the last five words of the first paragraph of this subsection referred only to the property of religious bodies or institutions. This point was decided against them 20 years ago in *O'Neill v. Northern Ireland Road Transport Board*[1], and I do not doubt that that case was rightly decided. An argument founded on the historical genesis of these words, which was in any case of little weight, could not prevail against their plain meaning.

Next, I must refer to an argument (though I am not clear which side could be assisted by it) that the words "either directly or in- "directly" do not govern the last five words. But grammatically they clearly do, and I see no reason for not allowing grammatical laws to prevail. In any view it is of no importance to this case.

I come then to the substantial questions: what is the meaning of the word "take"? what is the meaning of the word "property"? what is the scope of the phrase "take any property without com- "pensation"? My Lords, I would declare my indebtedness not only to the counsel for the parties but also to the Attorney-General for Northern Ireland and those assisting him for the help that they have given the House in the consideration of these questions. With their aid your Lordships have explored the federal constitutions of the United States of America, of Canada and of Australia, in which are to be found words similar, but perhaps not very similar, to the words now under review. But, my Lords, I doubt whether at the end of that journey the path is brightly illuminated.

I should like, however, before I venture upon it, to consider for a moment the simple language of the constitutional Act with which we are concerned. I hope that I do not over-simplify the problem, if I ask whether anyone using the English language in its ordinary signification would say of a local authority which imposed some restriction upon the user of property by its owner that that authority had "taken" that owner's "property." He would not make any fine distinction between "take," "take over" or "take away." He would agree that "property" is a word of very wide import, including intangible and tangible property. But he would surely deny that any one of those rights which in the aggregate constituted ownership of property could itself and by itself aptly be called "property" and to come to the instant case, he would deny that the right to use property in a par-

[1] [1938] N.I. 104.

ticular way was itself property, and that the restriction or denial of that right by a local authority was a "taking," "taking away" or "taking over" of "property."

I do not seek to qualify in any way what has been said in such cases as *Central Control Board (Liquor Traffic) v. Cannon Brewery Co. Ltd.*[1]. I have no right to do so. It is, no doubt, the law that the intention to take away property without compensation is not to be imputed to the legislature unless it is expressed in unequivocal terms. But this principle, upon which learned counsel for the respondents so vigorously insisted, seems to me to have no bearing upon the question what is the meaning of the phrase "take property without compen-"sation" in a constitutional instrument such as the Government of Ireland Act. If, indeed, I must have recourse to any broad principle of law for the construction of these few simple words, I should remind myself that from the earliest times the owner of property, and in particular of land, has been restricted in his free enjoyment of it not only by the common law maxim sic utere tuo ut alienum non laedas, but by positive enactments limiting his user or even imposing burdens upon him. I do not therefore approach this question of construction with any predisposition to enlarge the scope of the vital words. For, my Lords, I would here point out that, if such restrictions as the Acts of 1931 and 1944 impose cannot be enforced without the payment of compensation, the practical effect must be to deprive the Parliament of Northern Ireland of the power to legislate, not only in this particular field in a manner recognised as necessary to its proper fulfilment in Great Britain, but in numerous other fields also in which it has been widely realised that the rights of the individual must be subordinate to the general interest. Learned counsel for the respondents were constrained to admit that their success in this argument might lead to the invalidation of numerous Acts whose validity has been hitherto unchallenged. It would not be easy to reconcile this result with the power accorded to the Parliament by section 4 of the Act to make laws for the peace, order and good government of Northern Ireland. It is right, however, that in the interpretation of constitutional instruments guidance should be sought from those courts whose constant duty it has been to construe similar instruments, if only because, as it appears to me, a flexibility of construction is admissible in regard to such instruments which might be rejected in construing ordinary statutes or inter partes documents. The courts of Northern Ireland have not hesitated to adopt this course and have found assistance in their task of construing their own constitution

[1] [1919] A.C. 744; 35 T.L.R. 552.

from the manner in which great judges among the English-speaking peoples overseas have dealt with kindred problems. I do not think that any better examples can be found than in the passages cited by the Lord Chief Justice from the judgments of Holmes J. and Brandeis J. Thus, when Brandeis J. says in the passage quoted by the Lord Chief Justice from his judgment in *Pennsylvania Coal Co. v. Mahon*[1]: "Every restriction upon the use of property imposed in the exercise of "the police power deprives the owner of some right theretofore "enjoyed, and is, in that sense, an abridgment by the State of rights in "property without making compensation. But restriction imposed to "protect the public health, safety or morals from dangers threatened "is not a taking. The restriction here in question is merely the "prohibition of a noxious use," that very learned judge indicated in clear terms the distinction which should guide us in determining whether or not legislation which diminishes the owner's free enjoyment of his own property is a "taking" of that property. It is clear that such a diminution of rights can be affected without a cry being raised that Magna Carta is dethroned or a sacred principle of liberty infringed.

I will say only one thing more about the American cases. The day may come when it will be necessary to consider the relevance to the constitution of Northern Ireland of the observation of Holmes J. in the case already cited[2]: "The general rule at least is, that, while "property may be regulated to a certain extent, if regulation goes too "far it will be recognised as a taking." If the question is one of degree, I am clearly of opinion that the day did not arrive with section 10(2) of the Act of 1931.

My Lords, the distinction drawn between "regulating" and "taking" of "regulatory" and "confiscatory" will at once bring to mind the controversy to which placitum (xxxi) of section 51 of the Australian Constitution has given rise. Upon decisions of the High Court of Australia on this placitum the respondents strongly relied. At one stage learned counsel said he was prepared to rest his case on the *Minister of State for the Army v. Dalziel*[3], the facts in which case were widely different from those we have now to consider. No doubt the language there under review "the acquisition of property on just "terms" was not dissimilar to that in our constitutional Act, and these words have led to much the same controversy as have the Fifth and Fourteenth Amendments in the United States of America. Nor do I doubt that the same considerations are relevant to the deter-

1 (1922) 260 U.S. 393, 417.
2 Ibid. 415.
3 (1944) 68 C.L.R. 261.

mination of their meaning. Nor would I cast the least doubt upon the decision in *Dalziel's* case[1], or anything that was said by the learned judges who decided it. But, having said so much, and fully recognising the distinction that may exist between measures that are regulatory and measures that are confiscatory, and that a measure which is ex facie regulatory may in substance be confiscatory, I must add that, if as I suppose it is, the question is one of degree and the dividing line is difficult to draw, yet I have no doubt that such an enactment as the Act of 1931, and in particular section 10(2), falls well on the regulatory side of it. The respondents get no help from Australia.

I have used the expression "in substance confiscatory" and that takes me to Canada. In the consideration of the constitutional validity of legislation of the Federal or (as the case might be) of Provincial Parliaments the expression "pith and substance" came to be commonly used in order to determine whether an enactment was truly within the legislative power of the one Parliament or the other under the British North America Act. It is an expression that has had its uses not only in Canada: see *Gallagher v. Lynn*[2]. But I think that it can give little assistance to your Lordships in considering the meaning of our five words, to which I now return. For there is one aspect of the case which deserves particular attention, since by it the Lord Chief Justice was influenced to consider the section invalid. Having held (and, as I think, rightly held) that much that is entirely reasonable may be done under the powers conferred by section 10(2), and that those powers are capable of being exercised reasonably, the learned judge says: "But, if such powers are capable of being exercised "reasonably, it is impossible to say that they may not also be exercised "unreasonably." And after giving examples of unreasonable exercise he concludes: "If, then, a planning authority exercises any of the "powers to which section 10(2) relates in a manner which fails to "satisfy what I have called the second test by being unreasonable and "thereby causes loss or damage which constitutes a taking and to "meet which no right to compensation is available, there will, in my "opinion, be a breach of section 5(1)" [i.e., of the Government of Ireland Act]. My Lords, it appears to me that the short answer to this contention (and I hope that its shortness will not be regarded as disrespect) is that the validity of a measure is not to be determined by its application to particular cases. It is not for the "planning "authority" but for the Ministry to determine whether a proposed exercise of the powers is reasonable. That is an administrative duty,

[1] (1944) 68 C.L.R. 261.
[2] [1937] A.C. 893; 53 T.L.R. 929; [1937] 3 All E.R. 598.

to be exercised not arbitrarily but for the purposes of the Act. If it is not so exercised, it is open to challenge, and there is no need for express provision for its challenge in the statute. If I understand the learned Lord Chief Justice, he would not consider the section invalid if the duty of deciding upon the reasonableness of the exercise of a power was given not to the Ministry but to the judiciary. But I find it difficult to suppose it to be the purpose or theory of any constitution that a purely administrative function of this character should be given to the judiciary rather than to the executive. Matters of policy which are determined by the Government and carried out in detail by the aid of an experienced administrative staff cannot be confided to the judiciary. Their function begins if and when for any reason administrative action lays itself open to challenge. The measure itself is not open to such challenge unless it is plainly and on the face of it within the prohibition. That condition is not satisfied merely because the powers it confers upon the executive may be exercised unreasonably. I am therefore of opinion that the ground upon which specifically the Lord Chief Justice held the section to be invalid was not sound.

I would answer the first question posed by the arbitrator: No, provided that the arbitrator is satisfied by proper evidence that the Ministry considers the provisions reasonable.

I must now return to the second question upon which the arbitrator asked the opinion of the court, viz., whether the evidence of Mr. A. P. Fitzgerald was sufficient to satisfy the requirements of the relevant section, i.e., that "the Ministry, having regard to the nature "and situation of the land affected by the provisions, considers "reasonable for the purpose" the provisions inserted in the planning scheme to which the subsection refers. [His Lordship set out the evidence of Mr. A. P. Fitzgerald and continued:] The question is whether this evidence satisfied the statutory requirement. I think that there are really two questions here, one of substance, the other of form. Upon the question of substance I find no legitimate ground of criticism. It appears to me that, since section 6(4) of the Act of 1944 is designed to meet precisely the case where no planning scheme has yet been prepared and submitted for approval, the Ministry satisfies the conditions of section 10(2) of the earlier Act if it considers provisions to be reasonable which it would consider reasonable having regard to the nature and situation of the land thereby affected if a scheme had been made embracing that land. It is not possible to be more specific than the situation envisaged by the later Act admits.

The question of form, however, remains. In a matter of this importance strict adherence to form is requisite. It is not, to my mind, satisfactory that, if oral evidence is necessary, it should be given by a witness who, admittedly knowing nothing about it, speaks on instructions. I should therefore, without meaning any disrespect to Mr. Fitzgerald, say that his evidence should be disregarded. But this does not end the matter. I do not think that it was necessary or, indeed, proper for the appellants to prove that the Ministry thought the provisions in question reasonable by the introduction of an officer of the Ministry to give oral evidence. It is not a matter for cross-examination of this or that official of the Ministry or of the Minister himself. Nevertheless, the statutory fact must be strictly proved, and it appears to me that the proper course is that a certificate should be issued to the required effect under the Minister's seal and duly authenticated. Such a certificate when tendered would prove itself under section 3(1) of the Ministries of Northern Ireland Act (Northern Ireland), 1921.

I answer the second question posed by the arbitrator in the negative. With these answers the case will go back to him for his further determination and answer.

My noble and learned friend, LORD COHEN, who is unable to be here this morning, has asked me to say that he concurs in the opinion that I have just given, and with that which my noble and learned friend, Lord Radcliffe, will shortly give.

LORD RADCLIFFE. My Lords, I am in full agreement with what has been said by my noble and learned friend on the Woolsack. That being so, I do not think that it would serve any useful purpose if I travelled again over the same ground.

It is no disrespect to the learning and weight of the judgment of the Lord Chief Justice in the Court of Appeal in Northern Ireland if I say that my principal reason for disagreeing with his conclusion is that I do not believe that the present case raises the issues that he has dealt with quite in the form in which he considers them. The fundamental question, as I see it, is whether the prohibition of taking any property without compensation contained in section 5(1) of the Government of Ireland Act, 1920, bars the enactment by law of such restrictions on the user or development of property as are referred to in section 10(2) of the Planning and Housing Act (Northern Ireland), 1931, unless compensation is provided. In my opinion, it does not, because it seems to me that the word "taking" when used in this context does not extend to cover the act of imposing restrictions of that kind.

I do not see how you can give a meaning to this phrase, "taking "without compensation," except by reference to the general treatment of the subject in the law of England and Ireland before 1920. A survey would, I think, discern two divergent lines of approach. On the one hand, there would be the general principle, accepted by the legislature and scrupulously defended by the courts, that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in its place. Acquisition of title or possession was "taking." Aspects of this principle are found in the rules of statutory interpretation devised by the courts, which required the presence of the most explicit words before an acquisition could be held to be sanctioned by an Act of Parliament without full compensation being provided, or imported an intention to give compensation and machinery for assessing it into any Act of Parliament that did not positively exclude it. This vigilance to see that the subject's rights to property were protected, so far as was consistent with the requirements of expropriation of what was previously enjoyed in specie, was regarded as an important guarantee of individual liberty. It would be a mistake to look on it as representing any conflict between the legislature and the courts. The principle was, generally speaking, common to both.

Side by side with this, however, and developing with increasing range and authority during the second half of the nineteenth century came the great movement for the regulation of life in cities and towns in the interests of public health and amenity. It is not an adequate description of the powers involved, so far at any rate as the United Kingdom is concerned, to speak of them as "police powers." They went far beyond that. Their chief sphere was in the delegated legislation conceded to local authorities, though in some cases they arose from the direct legislation of Parliament itself. Achieved by one means or the other, there is no doubt at all that the effect of them was to impose obligations and restrictions upon the owner of town land which impaired his right of development, prohibited or restricted his rights of user and, in some cases, imposed monetary charges upon him or compelled him to expend money on altering his property. Generally speaking, though not without exception, these obligations and restrictions were treated as not requiring compensation, though, of course, in a sense they expropriated certain rights of property.

A perusal of the Public Health Act, 1875, will be sufficient to make the point. It shows how extensive interference could be, even at that date. Only in a few special cases is compensation provided for the

consequence of interference. No one, so far as I know, spoke of this as a "taking of property" or treated the general principle of "no "taking without compensation" as applicable to the case. For instance, by-laws, which have to be "reasonable," i.e., not manifestly unjust, if the courts are to sustain them, were upheld, even though seriously restricting the user of property without affording any compensation for the restriction (see *Slattery v. Naylor*[1], a case from Australia).

When town planning legislation came in eo nomine in 1909 the emphasis had no doubt shifted from considerations of public health to the wider and more debatable ground of public amenity. It may possibly have been for this reason, I do not know, that the Act of 1909 included a comprehensive, though not exhaustive, "injurious "affection" section, the effect of which was to give property owners whose rights were interfered with in the cause of town planning a right to compensation for any damage that they suffered, subject to counterclaims for betterment and certain exclusions. This "injurious "affection" embraced an altogether wider category of injury than the "injurious affection" that had been the subject of compensation under the Lands Clauses Act, 1845. In fact, as we know, section 59(2) of the Housing, Town Planning, etc., Act, 1909 (which did not itself extend to Ireland), excluded compensation for injurious affection in respect of several of the same heads of restriction as those which are found in section 10(2) of the 1931 Act in Northern Ireland. I do not think that this last circumstance has any bearing on the present issue: the Westminster legislature with its full sovereignty might be able to exclude compensation in cases where the Northern Ireland Parliament under its constitutional limitations could not. What is important, I think, is to recognise that though interference with rights of development and user had come to be a recognised element of the regulation and planning of towns in the interest of public health and amenity, the consequent control, impairment or diminution of those rights was not treated as a "taking" of property nor, when compensation was provided, was it provided on the basis that property or property rights had been "taken," but on the basis that property, itself retained, had been injuriously affected.

These considerations lead me to the following conclusions: (1) The taking of property referred to in section 5(1) of the Government of Ireland Act, 1920, ought not to be treated as applying to the imposition of restrictions on user and development under town-planning powers. (2) It is within the competence of the Parliament of

[1] (1888) 13 App. Cas. 446; 4 T.L.R. 426.

Northern Ireland to decide on what occasions and to what extent compensation is to be afforded for injury suffered under such restrictions. (3) Section 10(2) of the Act of 1931 is accordingly a valid enactment.

Viewing the matter from this aspect, I do not think that the requirement that compensation can only be excluded if the Ministry concerned passes the restrictions as reasonable for the purpose raises any relevant issue. If compensation could validly be excluded anyway in such cases, the legislative power cannot have been less validly exercised because the town-planning authority's liberty to exclude compensation has been limited by such a provision. It may be in itself a very salutary limitation: but that is not a matter for the court.

It follows, too, that the question whether the provision "ousts the "jurisdiction of the court" in any relevant sense—a question to which the learned Lord Chief Justice gave much attention in the later passages of his judgment, and upon which he ultimately founded his decision of the appeal—does not, in my opinion, arise.

I do not imply by what I have said that I regard it as out of the question that on a particular occasion there might not be a restriction of user so extreme that in substance, though not in form, it amounted to a "taking" of the land affected for the benefit of the public. It is not very easy to imagine such a restriction being imposed by a responsible authority or surviving the test of the Ministry's approval, the more so as the Act deals separately with open spaces as a subject of acquisition, not without compensation. But given that such a case might hypothetically occur, the question for us is whether that possibility in itself is sufficient to invalidate section 10(2), the natural subject of which is restrictions and not "takings." I do not think that it is. It seems to me the wrong way to treat the constitutional provision. To my mind, it does more justice to its intent if a restriction which is in substance a taking, should one ever occur, is attacked ad hoc as not within the true meaning and scope of section 10(2) than that the whole subsection should be thrown on the scrap-heap as constitutionally an outlaw.

The second question raised by the official arbitrator's case stated relates to formalities only, except so far as it may incidentally throw light on the question whether section 10(2) of the Planning and Housing Act (Northern Ireland), 1931, is introduced into interim development by section 6(4) of the Planning (Interim Development) Act (Northern Ireland), 1944. The case stated is accepted by both sides as a consultative case: therefore, it if is right to conclude that

the evidence given by Mr. A. P. Fitzgerald is insufficient to prove the consent of the Ministry of Health and Local Government, the hearing before the arbitrator must be continued and the necessary evidence called for or tendered.

This question of the form of evidence required is not an easy one, but, on the whole, I take the same view as that which has been taken in the Divisional Court and the Court of Appeal in Northern Ireland on this issue, if not for quite the same reasons.

What has to be before the tribunal, if effect is to be given to section 10(2), is the view or judgment of "the Ministry" that certain planning provisions are reasonable for the purpose. The Ministry itself is an impersonal legal entity, and it is only by some use of metaphor that such mental processes as views can be attributed to it. The question is not how they can be or why they have been formed, but how they can be proved so that a tribunal can act upon them. For this purpose I do not think that one should look for the Minister himself or some senior official to attend in person so as to satisfy the court by oral testimony that "the Ministry" in fact holds the required opinion. Indeed, I should not regard cross-examination as open on the issue whether the Ministry should hold such an opinion, given that it declares that it does. The natural and, I think, the proper way to record the view of the Ministry in such a context is to bring into existence a certificate over the Ministry's proper seal, authenticated as the statute requires, and to tender that before the arbitrator. If so tendered, it will prove itself by virtue of section 3(1) of the Ministries of Northern Ireland Act (Northern Ireland), 1921, "unless the "contrary is shown."

It was one aspect of the respondent's argument that until a planning scheme in the proper sense had come into operation no such Ministry view as that required by section 10(2) of the Act of 1931 could be formed or expressed. I do not agree with this, if one once arrives at the conclusion, as I believe that all your Lordships do, that section 6(4) of the Act of 1944 necessarily involves the hypothesis that the provisions of section 10(2) are adapted to the situation where a projected development has been restricted under interim development control. A certificate given under those conditions in the present case would be to the effect that the Ministry considered that the provisions prescribing height, character and user of buildings and sites, which by virtue of the Planning Acts (Northern Ireland), 1931 and 1944, and the Planning (General Interim Development) Order (Northern Ireland), 1944, and the refusal by the appellants of the

respondent's application to proceed with development had been imposed upon the respondent's land, were, having regard to the nature and situation of the land affected, reasonable for the purpose.

I do not think that the evidence actually tendered by Mr. Fitzgerald ought to be treated as adequate to prove the Ministry's view. It is true that he was introduced by a letter from Mr. Green, an assistant secretary: but the letter itself is neither a certificate nor evidence of the essential fact to be proved, since its purport was to say that the necessary evidence would be afforded by Mr. Fitzgerald when he appeared. What Mr. Fitzgerald said, when he did appear, was to the effect that he had no personal knowledge of the facts of the case, and had taken no part in the Ministry's decisions, but was sent to report what the Ministry's view was. No one can be expected to be altogether satisfied with this. His evidence of the relevant fact is only hearsay, and his own status is reduced to that of a messenger. I do not mean to imply any disrespect to him in the situation in which he was placed, but it seems to me that, if his Ministry does wish to communicate its opinion through a messenger, he ought to be allowed to carry with him a formal warrant of its view over the proper seal.

LORD KEITH OF AVONHOLM. My Lords, I agree.

Appeal allowed.

[It was ordered that the respondents should pay to the appellants three-quarters of their costs in the courts below, and that there should be no order as to costs in this House.]

Solicitors: *Lees & Co. for John Young, Belfast; Simpson, Palmer & Winder for N. & F. Tughan & Walmsley, Belfast; Linklaters & Paines for the Chief Crown Solicitor, Belfast.*

F.C.

MERCANTILE CREDIT CO., LTD. v. MANN & ANOTHER[1]

PRACTICE NOTE

Practice—Judgment in default of appearance—Hire purchase company claiming arrears of instalments and the return of a car or its value—Severance of claims—Right to enter judgment by default for the liquidated amount—R.S.C. Or. 13, *rr.* 7, 8.

A hire purchase company issued a writ claiming arrears of hire purchase instalments and the return of a car, the subject of the hire purchase agreement, or its value. No appearance was entered by either the hirer or the guarantor. The plaintiff company sought to enter final judgment for the liquidated amount under Order 13, rule 7, but the assistant registrar took the view that the claims on the writ could not be severed and that, accordingly, judgment could not be entered for the liquidated amount without an application to the court under Order 13, rule 8, in respect of the claim for delivery of the car. The plaintiff then applied ex parte for leave to enter final judgment against both defendants for the liquidated amount and for an order under Order 13, rule 8, for the return of the car by the hirer.

Lord MacDermott L.C.J. held that the plaintiff was entitled to sever the claims on the writ for the purpose of entering judgment under Order 13, rule 7. His Lordship accordingly made the order sought, but directed that, as the application was ex parte, the order should be served on the defendants and that entry of judgment should be stayed for a week after service so that the defendants might have an opportunity, if they so desired, of moving to have the order set aside.

S.M.M.

[1] In the Queen's Bench Division before Lord MacDermott L.C.J.: May 6, 1960.

CUNNINGHAM v. WINTON & MINISTRY OF HOME AFFAIRS[1]

PRACTICE NOTE

Practice—Application to have consent settling an action made a rule of court—Whether consent on behalf of Ministry properly executed—Ministries Act (Northern Ireland), 1921 (12 Geo. 5, c. 6), ss. 2, 3.

In an action in which the Ministry of Home Affairs was a defendant an application was made to have a consent settling the action made a rule of court. The consent was signed by the Chief Crown Solicitor. It did not bear the seal of the Ministry nor did it appear on the face of the document that the Chief Crown Solicitor was authorised to sign on behalf of the Ministry. Section 2(3) of the Ministries Act (Northern Ireland), 1921, provides that "In the execution or performance "of its powers or duties the Ministry shall adopt and use the style and "seal of the Ministry: provided that the Minister may authorise the "use of special designation by any officer, officers or committee to "whom any specified powers or duties have been assigned by him "under this Act." Section 3(1) provides for the reception in evidence of "every document.... purporting to be signed by a secretary or "assistant secretary of the Ministry or other officer of the Ministry "authorised by the Minister in that behalf."

SHEIL J. declined to accept the consent on the ground that it neither bore the seal of the Ministry nor did it purport to have been signed by an officer of the Ministry authorised by the Minister in that behalf.

S.M.M.

[1] In the Queen's Bench Division before Sheil J.: Feb. 5, 1960.
The application, which was made in chambers under Order 54, rule 13, is reported by permission of the judge.

BUCKLEY v. IRWIN[1]

Contract—Specific performance—Grounds for refusal of decree—Equitable fraud. Sale of land—Note or memorandum in writing—Sufficiency of memorandum—Statute of Frauds, 1695 (7 *Wm.* 3, *c.* 12 (*Ir.*)), *s.* 2.

The defendant, a man whom the trial judge found to be "not a person of "unsound mind but.... a person who would require protection and guid- "ance in carrying out business affairs, even of a comparatively simple "nature", agreed to sell his farm and the dwelling-house in which he lived, together with an agricultural tractor, for the sum of £2,700, a price which the judge regarded as a substantial undervalue, though not necessarily such a gross undervalue as to be of itself evidence of fraud. The negotiations leading up to the agreement arose out of a casual conversation between the defendant and the plaintiff on an occasion when the plaintiff and a companion called at the defendant's farm for the purpose of buying some cattle. Neither party had previously considered the sale or purchase of the farm and the agreement was reached in less than half an hour.

Immediately after the agreement had been reached the plaintiff, on the suggestion of the companion, paid £100 in cash to the defendant by way of deposit, and the companion then wrote out in duplicate a memorandum in the following terms: "Farm and tractor sold. 2,700 pounds. One hundred "paid." Each copy of the memorandum was signed by the three men, but the memorandum contained nothing to show who was the purchaser or who was the vendor. Of the three men the defendant alone possessed both a farm and a tractor.

No agreement was made as to the date of completion of the contract, and no reference was made to the fact that a part of the farm was subject to a charge in respect of a legacy of £50, or to the fact that the tractor was subject to a hire-purchase agreement under which a sum of £255 remained outstanding; and there was no discussion as to where the defendant would live when he vacated the dwelling-house.

A few days later during discussions between the plaintiff and the defendant in a solicitor's office relating to the payment of the legacy, the costs, the date for possession and the responsibility for payments of the instalments on the tractor, the defendant stated that the deal was off and he attempted to hand back the deposit. The plaintiff thereupon brought an action for specific performance of the agreement or, alternatively, for damages for breach of contract.

Held, (i) that the circumstances leading up to the agreement were such as to raise a grave doubt as to the fairness of the transaction and that specific performance should be refused on this ground.

Conlon v. Murray [1958] N.I. 17 applied.

(ii) that the agreement was such as to be vitiated by fraud other than actual fraud, in the sense that it was one in respect of which it would be unconscientious for the plaintiff to avail himself of the legal advantages which he had thereby obtained, and that though the defendant had not asked

[1] In the Chancery Division before McVeigh J.: Dec. 1, 2, 3, 4, 19, 1959.

for rescission of the contract, damages for breach of contract should be refused on this ground.

Semble that the memorandum in this case was sufficient to satisfy the Statute of Frauds.

Quaere whether a decree for specific performance may be made in respect of a contract for the sale of land together with chattels in the absence of special circumstances.

ACTION for specific performance of an agreement for the sale of a farm together with an agricultural tractor for the sum of £2,700.

The defendant owned a farm of land registered on Folios Nos. 13840 and 13841 County Armagh. The farm comprised a dwelling-house and 22½ acres including 3 acres of orchard, and had been purchased for the defendant by his father in 1950. At that time the purchase price of the farm, together with other lands comprising 23 acres had been £5,800, and the defendant's farm was valued by an estate agent who gave evidence on his behalf, at £4,250, and by an agent called for the plaintiff at £2,600, the respective valuations of the tractor being £475 and £425. The defendant had obtained the tractor one year previously under a hire-purchase agreement under which a sum of £255 13s. 0d. remained outstanding at the date of the sale.

The defendant lived alone in the dwelling-house and kept livestock on a very small scale. He did not otherwise farm the lands or work the orchards, but had a part of the lands let in conacre. After hearing evidence as to the plaintiff's character and history, the trial judge found him to be "not a person of unsound mind but.... a person "who would require protection and guidance in carrying out business "affairs, even of a comparatively simple nature." The judge also found that the plaintiff and one W. J. Irwin who accompanied the plaintiff on the occasion of the sale were "two sharp-eyed and "experienced dealers."

The agreement relied upon by the plaintiff was made on October, 25, 1958. Neither party had previously considered the sale or purchase of the farm, and the negotiations leading up to the agreement arose out of a casual conversation between the parties on the occasion of a visit to the defendant's farm by the plaintiff and W. J. Irwin for the purpose of buying cattle. The negotiations lasted less than half an hour and immediately after agreement had been reached the plaintiff, on the suggestion of W. J. Irwin, paid to the defendant a sum of £100 in cash by way of deposit, and W. J. Irwin wrote out in duplicate a memorandum in the following terms:—

"Farm and Tractor sold.
"2,700 Pounds
"One Hundred Paid."

Each copy was then signed in turn by the defendant, the plaintiff and W. J. Irwin, but there was nothing in the document to show who was the vendor or who was the purchaser. Neither the plaintiff nor W. J. Irwin possessed a farm and a tractor at that time. One copy of the memorandum was given to the defendant, and the other was kept by the plaintiff, who subsequently stamped his copy with a sixpenny stamp on the advice of his solicitor.

At the time when the agreement was made no arrangement was made as to when the contract was to be completed, and no reference was made to a charge in respect of a legacy of £50 which was registered on one of the folios or to the fact that the tractor was subject to a hire-purchase agreement, nor was there any discussion as to where the defendant would go to live when he left the farm.

Two days after the date of the agreement the parties and W. J. Irwin attended at the office of the plaintiff's solicitor to make arrangements for completion of the sale and were seen by the solicitor's clerk. They had not sufficient information regarding the property, and it was arranged that they should return the following day. On that day the parties and W. J. Irwin discussed the matter with the solicitor and his clerk, and the question arose as to who would discharge the legacy and the hire-purchase debt. The defendant refused to do so, and offered to return the deposit and cancel the agreement, but this was refused.

Gibson Q.C. and *Rowland* for the plaintiff. The memorandum does not deal with some matters which might have been dealt with, but we submit that the plaintiff is entitled to treat the contract as an open contract. The memorandum contains all that is necessary to satisfy the requirements of the Statute of Frauds—the parties, the price and the subject matter. It shows that the contract was a sale, and oral evidence is admissible to show which of the persons named in the memorandum was purchaser and which was vendor: see *Newell v. Radford*[1]. The memorandum refers to the payment of a deposit and oral evidence is also admissible to show who paid the money: *Carr v. Lynch*[2]; *Stokes v. Whicher*[3]. The latter case involved two documents, because one of the parties was not named in the memorandum, but in another document referred to in it and the case also shows that

[1] (1867) L.R. 3 C.P. 52.
[2] [1900] 1 Ch. 613.
[3] [1920] 1 Ch. 411.

duplicates may be connected for the purpose of forming a memorandum. It is necessary that the memorandum should identify the subject matter to show what is being sold, but oral evidence may be admitted to show what the description in the memorandum was intended to refer to: see Halsbury's Laws of England, 3rd ed., vol. 8, p. 101, note (h), and the cases there cited.

Apart from the memorandum, there is evidence of a contract of sale, and the memorandum refers to the sale of a farm and a tractor; they are not otherwise identified, but the evidence is that, of the three persons named, the defendant alone possessed a farm and a tractor, and thus he was the vendor. The price is set out, and it is stated that a deposit was paid; the evidence is that the plaintiff paid the money, thus showing that he was the purchaser, and an additional point as to the identification of the parties is the fact that the plaintiff and the defendant were the persons who had the copies of the memorandum.

It is true that the defendant was not the owner of the tractor, by reason of the terms of the hire-purchase agreement, but we submit that that is immaterial. The implied condition as to title in the case of an agreement for sale is that the vendor will have the right to sell the goods at the time when property is to pass: Sale of Goods Act. 1893, s. 12(1).

The fact that the contract relates to a chattel as well as to land does not affect the jurisdiction to grant a decree of specific performance, for the court has a discretion to decree specific performance of a contract for the sale of specific or ascertained goods: Halsbury's Laws of England, 2nd ed. vol. 29, p. 200. See also Fry on Specific Performance, 6th ed. p. 36 note (6); *Marsh v. Milligan*[1].

Kelly Q.C. and *Creaney* for the defendant. The onus of proof is on the plaintiff to establish an enforceable contract, and to show that there is a sufficient memorandum to comply with the Statute of Frauds. The memorandum must identify the parties and the subject matter and it is not sufficient that the name of a party to the contract should appear in the memorandum without any description to show whether he is vendor or purchaser: see *Dewar v. Mintoft*[2]. Oral evidence cannot be admitted unless the parties are indicated in the memorandum.

We submit that a decree for specific performance should not be granted in this case. The principles upon which the court will refuse to grant such a decree are set out in Halsbury's Laws of England, 2nd

[1] (1857) 3 Jur. (N.S.) 979. [2] [1912] 2 K.B. 373.

ed. p. 366 et seq., and in Fry on Specific Performance, 6th ed. at pp. 185, 199. See also the judgment of Black L.J. in *Conlon v. Murray*[1]. In this case the evidence reveals four elements, any one of which would constitute a reason for refusing specific performance: (i) Inequality between the parties. It is clear from the behaviour of the parties in the witness box that the defendant's business acumen falls far short of the plaintiff's and if inequality is established the court will scrutinise the transaction very carefully, and may refuse specific performance even if there is no fraud on the part of the plaintiff: see *Evans v. Llewellin*[2], which was followed in the Irish case of *Slator v. Nolan*[3]: (ii) Surprise. One of the factors in *Conlon v. Murray*[1] which was referred to by Black L.J. was that the plaintiff had been quick to seize the opportunity of buying the farm, but in that case, the contract was not signed until two days after the agreement was reached, whereas in this case, the whole transaction only took about half an hour: (iii) Inadequacy of consideration. Even the evidence of the plaintiff's valuer shows that the sale was at an undervalue, and we would submit that it was in fact at a gross undervalue: (iv) The defendant had no legal advice, or any independent advice, and that fact, or other similar circumstances appearing inconsistent with intelligent consent may make it inequitable that he should be forced to perform his contract: see Halsbury's Laws of England 2nd ed., vol. 31, para. 417. [They referred also to *Longmate v. Ledger*[4] and *Inche Noriah v. Shaik Allie Bin Omar*[5]].

Gibson Q.C. in reply. We accept that the memorandum must name or identify the parties and the subject matter, but the Statute of Frauds did not require that contracts should be in writing. What it required was some written evidence of the contract with a view to preventing perjury, and so long as the necessary elements are contained in the memorandum, the memorandum coupled with oral evidence provides sufficient certainty. In *Dewar v. Mintoft*[6] the memorandum did not state the nature of the transaction.

If the court refuses specific performance, damages may be granted in lieu: *Tamplin v. James*[7].

Cur. adv. vult.

McVeigh J. stated the facts of the case and considered the evidence in detail. He stated that he proposed "to treat the case as being one

1 [1958] N.I. 17, 25.
2 (1787) 1 Cox 333.
3 (1876) I.R. 11 Eq. 367.
4 (1860) 2 Giff. 157.
5 [1929] A.C. 127.
6 [1912] 2 K.B. 373.
7 (1879) 15 Ch. D. 215.

"of substantial undervalue, and not necessarily one of such gross "nature that one could infer without more that the case was one of "fraud." In a detailed review of the history and character of the parties he concluded that the plaintiff and W. J. Irwin were "two "sharp-eyed and experienced dealers" and that they "had the "defendant sized up as one who could be imposed on and that "they had known this for some time before the deal in question here "took place." With regard to the defendant his Lordship stated: "He is not, in my judgment, a person of unsound mind but.... he is "a person who would require protection and guidance in carrying "out business affairs, even of a comparatively simple nature."

His Lordship then continued: Having set out the relevant facts and commented on them, it is now necessary to look at the equitable principles applicable to such a case. Equitable relief may be refused even though there has been no improper conduct on the part of the plaintiff—it is enough if the facts as a whole make it inequitable to grant the relief sought: *Twining v. Morrice*[1]. And Black L.J. in *Conlon v. Murray*[2] says: "The remedy of specific performance still "retains the character of an equitable remedy. It is not granted as of "right but is a discretionary remedy which may be withheld in cases "of a type where the court, having regard to the conduct of the "parties and all the circumstances of the case, considers in its "discretion that the remedy ought not to be granted. This discretion ".... is a discretion to be exercised on the principles which have "been worked out in a multitude of decided cases. And it is well "established that there is a class of cases in which a contract may be "such, and entered into in such conditions, that the court will not "order it to be rescinded but, at the same time, looking to the "substantial justice of the case, will not order it to be specifically "performed. It follows naturally, as observed in Kerr on Fraud and "Mistake, 7th ed. (1952), p. 568, that when the aid of a court is "sought by way of specific performance of a contract the principles "of ethics have a more extensive sway than when a contract is "sought to be rescinded." Again he says that the specific performance of a contract will not be refused on the sole ground that one of the parties had not legal advice. He cites a passage from Story's Equity Jurisprudence which indicates that the discretion in such cases is "not arbitrary or capricious.... but.... governs itself, so far as it "may, by general principles; but at the same time which withholds or

[1] (1788) 2 Bro. C.C. 326. [2] [1958] N.I. 17, 25.

"grants relief according to the circumstances of each particular case, "when these rules and principles will not furnish any exact measure "of justice between the parties." Where the circumstances are such as to raise a grave doubt as to the fairness of the transaction it would seem that specific performance may be and probably should be refused. In the case with which the learned Lord Justice was dealing the vendor was a woman of 69 years of age who was mentally alert and vigorous, but was suffering from two painful and weakening ailments. Because of certain trouble with a brother who was living with her the judge thought it was not surprising that she should have an impulse to get rid of the responsibility of the house and the farm. This might be thought to have been a transitory mood or it might not. But, as he says, the idea of selling the farm raised questions requiring deliberation and reflection. Where was she to go to live? What was to become of her brother?

It seems to me that in the present case the entering into an agreement for the sale of the farm was a matter requiring deliberation and reflection on the part of the defendant. I do not think that any thought was given to the question of where he was to go to live; or to such questions as: When was he to give up possession of the land and the house? What was the true value of the land and the tractor? How a composite sale of land and tractor should be carried out having regard to the charge of the legacy, and the fact that there were outstanding instalments on the tractor? How he was to find the money to pay off the instalments before he could give a good title? All these were matters which required consideration and upon which it seems that the defendant needed legal advice or, at least, some responsible independent advice. I have little doubt that this was a case in which the defendant required independent advice not only on the Tuesday, but more particularly on Saturday, October 25, when the agreement now challenged was being made. For the reasons which I have already given it is my view that this was a snap bargain at a considerable undervalue, even if it was not a gross undervalue; and that, above all, the plaintiff with the ready assistance of W. J. Irwin took advantage of the defendant's incompetence. I am satisfied that this was an unethical bargain, and infringed the principles of fairness, which a court of equity requires to be observed, in such a way and to such an extent that substantial justice would not be done unless the order for specific performance was refused. I accordingly refuse the relief claimed. Such an order could be made even if the plaintiff and W. J. Irwin were blameless in this transaction.

It also seems to be clear that contracts may be rescinded on the

grounds of fraud, other than actual fraud: see *Torrance v. Bolton*[1] where James L.J. points out that the "fraud" which may enable a contract to be set aside includes "transactions in which the Court is "of opinion that it is unconscientious for a person to avail himself of "legal advantage which he has obtained."

As I have already indicated I am not prepared to acquit the plaintiff and W. J. Irwin of blame and, accordingly I consider that this is a contract which ought not to be allowed to stand. Rescission has not been claimed in the pleadings, but I do not consider that a court of equity should allow damages for breach of contract in a case in which it is of opinion that the contract is vitiated in the way I have described. For this reason I refuse damages.

Having regard to the decision to which I have come and which is set out above, it is unnecessary for me to decide the very interesting argument addressed to me on the point as to whether the memorandum in this case was sufficient to satisfy the requirements of the Statute of Frauds. I may say that I am inclined to think that the closely-reasoned argument of Mr. Gibson is correct, but I do not propose to express any concluded view on the point.

Another point which was submitted was that, although the court would have power to grant specific performance of the sale of the tractor in order to effectuate this composite and indivisible contract it should not do so in the absence of some special circumstances and there were none, so it was argued, in this case. It was admitted by the plaintiff's counsel that the court had no power to apportion part of the price to the land and give specific performance of the contract for the sale of the land supposing it was considered that there was no defect in that part of the bargain. Counsel stated that their research had discovered no case which set out principles upon which the court should deal with such a set of circumstances, and having decided the case on another ground I prefer to express no opinion on how this particular point should be resolved.

Although the defence in this case was amended at the close of the plaintiff's case (after I had called attention to it on the first day) to raise clearly and specifically the issue of a non-concluded contract yet no submissions were made to me on this point, nor any authority cited. There are various pieces of evidence which might be called in aid to suggest that the bargain was not concluded when the documents were signed on October 25, 1958, and that it might have been

[1] (1872) L.R. 8 Ch. 118, 125.

understood that the documents were intended only to show that £100 had been paid and that the price was to be £2,700, but that all other matters were still to be negotiated before a solicitor. It may well be that these pieces of evidence were not considered of sufficient weight and cogency to show that the matter had not passed beyond the stage of negotiation.

The plaintiff will be ordered to pay the defendant's costs of the action. No order will be drawn up in this case until the defence is amended in proper form and order in accordance with the liberty which I gave to amend.

Judgment for the defendant.

Solicitors for the plaintiff: *T. D. Gibson & Co.*

Solicitor for the defendant: *E. McC. Thompson.*

J.P.

SHILLINGTON v. BELFAST CORPORATION[1]

Planning Acts—Refusal by planning authority of interim development application—Refusal upheld on appeal to Ministry of Health and Local Government—Terms of the refusal—Whether reasons given by planning authority superseded by those given by Ministry on appeal—No clear or specific limitation on the number of buildings—Whether compensation payable—Planning and Housing Act (Northern Ireland), 1931 (21 & 22 Geo. 5, c. 12), ss. 10(2)—Planning (Interim Development) Act (Northern Ireland), 1944, (c. 3), s. 6(4).

An interim development application by the claimant for permission to develop his property by building houses was refused by the respondents as planning authority. The grounds of the refusal were, (i) that the proposed development would involve excessive expense in road widening and the provision of sewers; (ii) that in the particular circumstances the development was undesirable in the interests of road safety; (iii) that the number and density of the houses proposed would be excessive; and (iv) that the size, character and nett annual valuation of the houses would not be in accordance with the authority's requirements for the area.

The claimant appealed to the Ministry of Health and Local Government but the appeal was dismissed on grounds which appeared from a letter from the Ministry to be that the proposed development would be detrimental to the amenities of the area. The appellant then sought compensation for the injurious affection of his property. At the request of the respondent the arbitrator who heard the claim stated his award in the form of a special case seeking the guidance of the court on the effect, if any, of section 10(2) of the Planning and Housing Act (Northern Ireland), 1931, and section 18 of the Roads Act (Northern Ireland), 1948, on the right to compensation.

Held, (i) that where there has been an appeal to the Ministry the reasons given by the Ministry for refusing an interim development application supersede those given by the planning authority;

(ii) that the decision of the Ministry that "the erection of 366 houses" would entail development which would be detrimental to the "existing "amenities of the area" was not a sufficiently clear or specific limitation to bring the terms of the refusal within section 10(2) of the Planning and Housing Act, (Northern Ireland), 1931;

(iii) that consequently it was unnecessary to decide whether the letter from the Ministry complied with the conditions necessary to constitute a valid certificate of "reasonableness";

(iv) that as there was no reference in the Ministry's decision to the problem of road safety, the question of the application of the Roads Act (Northern Ireland), 1948, did not arise.

CASE STATED by an official arbitrator under section 6 of the Acquisition of Land (Assessment of Compensation) Act, 1919.

On October 29, 1956, the claimant made an interim development

[1] In the Queen's Bench Division before Sheil and McVeigh JJ.: April 20, 21, May 2, 1960.

application to the respondent as planning authority under the Planning Acts (Northern Ireland), 1931 and 1944, seeking general planning permission in respect of the claimant's property known as Glenmachan Towers. This application was refused on January 4, 1957, the reasons for such refusal being stated as follows:

"1. The isolation of the site of the proposed development and the "narrowness of the roads bordering upon it would involve the "Corporation in excessive expense in the provision of new sewers "and road widening works.

"2. The steep and winding character of the Glenmachan Road, "even if widening were carried out, would made frontage develop- "ment undesirable in the interests of road safety.

"3. The number and density of houses proposed would be ex- "cessive in view of the difficulties regarding drainage and road "improvement mentioned above.

"4. The size, character and nett annual valuation of the houses in "the proposed development would not be in accordance with the "Corporation's requirements for the area.

"Generally, the application is refused so as to preserve the amenity "of the area, to safeguard road users and to avoid the excessive "expenditure of public money on such road and sewer facilities as "would be required for this development."

Notice of appeal against the refusal was given to the Ministry of Health and Local Government on May 2, 1957, time for appeal having been extended. The appeal came on for hearing before an inspector of the Ministry on June 28, 1957, when evidence was called and contentions put forward on behalf of the claimant and the respondent. By letter dated September 20, 1957, the claimant was informed through his solicitors that the Ministry had dismissed the appeal. In this letter the Ministry set out the reasons given by the respondents for the refusal, recited the contentions of the parties, and continued: "The site is a beautiful one with meadows containing "specimen trees and fringed by plantations. It is elevated, rising to "about 400 feet above sea level, and it is one of the properties which "gives the slopes of the Holywood Hills their pleasant character. The "site in question would be something less than 50 acres in extent. "The Ministry has carefully considered the representations made "by both parties and it has come to the conclusion that the erection "of 366 houses would entail development which would be detri- "mental to the existing amenities of the area. It considers that to "enable the development to be carried out it would be necessary to

"remove many of the trees and it considers that these should be "preserved. The decision of the Ministry is, therefore, to dismiss the "appeal."

The claimant then sought compensation from the respondent for injurious affection of his property by reason of the interim development refusal. At the hearing before the arbitrator it was argued on behalf of the respondent, (i) that the decision on the application for planning permission limited the number of buildings to be erected and that therefore, by reason of section 10(2) of the Planning and Housing Act (Northern Ireland), 1931, no compensation was payable; and (ii) that under the provisions of the Roads Act (Northern Ireland), 1948, the road authority could refuse permission to build fronting existing roads and that therefore no compensation was payable as a result of such refusal under section 10(1) of the 1931 Act.

The arbitrator assessed the amount of compensation which would be payable to the claimant if he were legally entitled thereto, and stated his award in the form of a special case for the determination of the following questions:

1. Whether, having regard to the terms of the refusal of the claimant's interim development application and the facts properly established by legal evidence, the claimant is entitled to compensation having regard to the provisions of section 10(2) of the Planning and Housing Act (Northern Ireland), 1931.

2. Whether, even if the case is otherwise within the provisions of section 10(2) of the Planning and Housing Act (Northern Ireland), 1931, that subsection is legally valid, or whether it is ultra vires the powers of the Parliament of Northern Ireland insofar as it purports to take away, or restrict, the right to compensation.

3. Whether, on the facts properly established by legal evidence, the operation of the Roads Act (Northern Ireland), 1948, which might restrict the opening of entrances from houses to be built to the existing roads bounding the premises without payment of compensation, brings into operation section 10(1) of the Planning and Housing Act (Northern Ireland), 1931, and would mean that no special building value should be attributed to the existing road frontages.

4. Whether, if the case is otherwise within the provisions of section 10(1) of the Planning and Housing Act (Northern Ireland), 1931, that subsection, or section 18 of the Roads Act (Northern Ireland), 1948, is legally valid, or whether it is ultra vires the powers

of the Parliament of Northern Ireland insofar as it purports to take away, or restrict, the right to compensation.

5. Whether, if the case is otherwise within the provisions of section 10 of the Planning and Housing Act (Northern Ireland), 1931, that section applies in view of the fact that no planning scheme is in operation in Belfast or otherwise affecting the property material to this case.

6. Whether, on the facts properly established by legal evidence, the arbitrator was entitled to award the claimant compensation against the respondents, as local authority, in respect of the injurious affection of his property sustained by the claimant by reason of the decision given on the claimant's interim development application of October 29, 1956.

Gibson Q.C., *McQuitty Q.C.* and *Porter* for the local authority.
Jones Q.C. and *Rowland* for the claimant.

Cur. adv. vult.

SHEIL J.: The judgment of the court will be delivered by McVeigh J.

MCVEIGH J.: This matter comes before us in the form of a special case stated for our opinion by the arbitrator, F. Malcolm McKibbin, M.A. (Cantab.), F.R.I.C.S., F.A.I. pursuant to section 6 of the Acquisition of Land (Assessment of Compensation) Act, 1919. The facts are fully and comprehensively set out in the case stated to which are attached all relevant documents; we do not, therefore, propose to recite any more of the facts than are strictly required for the purpose of our decision.

It is necessary, however, to say that this matter arose out of the result of a planning interim development application by one T. Courtenay Shillington (hereinafter called "the claimant") to the Belfast Corporation (hereinafter called "the Corporation") for permission to develop the claimant's property known as Glenmachan Towers. The application related to 43½ acres of land and the proposed development, as described in the application, was for 366 semi-detached dwelling units of 900 square feet floor area, two storied, and having a valuation of £35, and a density of 8 units per acre. This application is dated October 29, 1956, and was refused on January 4, 1957, the reasons for such refusal being stated as follows:

"1. The isolation of the site of the proposed development and the "narrowness of the roads bordering upon it would involve the

"Corporation in excessive expense in the provision of new sewers and "road widening works.

"2. The steep and winding character of Glenmachan Road, even "if widening were carried out, would make frontage development "undesirable in the interests of road safety.

"3. The number and density of houses proposed would be ex- "cessive in view of the difficulties regarding drainage and road "improvement mentioned above.

"4. The size, character and nett annual valuation of the houses in "the proposed development would not be in accordance with the "Corporation's requirements for the area.

"Generally, the application is refused so as to preserve the amenity "of the area, to safeguard road-users and to avoid the excessive "expenditure of public money on such road and sewer facilities as "would be required for this development."

If these are the reasons which are operative then it is clear that a refusal based on a number of these reasons would attract compensation, and it would also appear that some of the reasons given relating to such matters as "number and density of houses," and "nett annual valuation" could be matters which would debar the claimant from obtaining compensation by virtue of the provisions of section 10(2) of the Planning and Housing Act (Northern Ireland), 1931. However, counsel for the Corporation made it clear that his main argument on the application of section 10(2) was based on the refusal on the ground of limitation of number of buildings, but he desired to keep all points open.

Against this refusal of planning permission the claimant appealed to the Ministry pursuant to section 2(6) of the Planning (Interim Development) Act, 1944, and this appeal was heard by the Ministry on June 28, 1957. It is not clear from the case stated, indeed the matter does not appear to have been proved, what was the precise date and form of the decision of the Ministry but it is agreed that the letter dated September 20, 1957, and sent by the Ministry to the claimant's solicitors contains a copy of the Ministry's decision. It is also agreed that the last paragraph of the said letter forms no part of the decision. In this letter the Ministry after setting out the reasons for the Corporation's refusal then proceeds to recite the contentions of the parties. The setting out of contentions does not create findings of fact or decisions in law. See Halsbury's Laws of England, 3rd ed.

vol. 20, pp. 691, 692. Then, in the penultimate paragraph of this letter comes, what appears to us, to be the decision of the Ministry with the reasons for coming to that decision. This paragraph reads as follows:—

"The site is a beautiful one with meadows containing specimen "trees and fringed by plantations. It is elevated, rising to about 400 "feet above sea level, and it is one of the properties which gives the "slopes of the Holywood Hills their pleasant character. The site in "question would be something less than 50 acres in extent. The "Ministry has carefully considered the representations made by both "parties and it has come to the conclusion that the erection of 366 "houses would entail development which would be detrimental to "the existing amenities of the area. It considers that to enable the "development to be carried out it would be necessary to remove many "of the trees and it considers that these should be preserved. The "decision of the Ministry is, therefore, to dismiss the appeal."

Counsel for the Corporation concedes that, at most, the only item in section 10(2) of the 1931 Act which he can rely on as being mentioned in this decision is that which relates to limitation of number of buildings. Indeed, the Corporation accepted this, I think, when they asked the Ministry by letter dated December 17, 1958, to provide a witness to prove "reasonableness" under section 10(2) and asked that he should prove only that the provision as to limitation of number of buildings is reasonable.

The Planning (Interim Development) Act, 1944, section 2(6) provides that "the decision of the Ministry.... shall be final and "have effect as if it were a decision of the interim development "authority."

In this case the Ministry after setting out reasons why the houses should not be built then says "the decision.... is, *therefore*, to "dismiss the appeal."

Whilst the Corporation are bound to give reasons for their refusal, (see section 2(7) of the 1944 Act) it does not anywhere appear that the Ministry must give reasons for its decision upholding a refusal. Thus, it is argued by counsel for the Corporation that in so far as the Ministry does not have to give reasons, then where they do not do so the local authority's reasons should remain. If, however, the Ministry does give reasons, then it is contended that the reasons given by the local authority should remain to the extent that they are not in conflict with those of the Ministry. This is an interesting argument which we need not resolve because counsel for the Corporation has

fairly said that he is happy to rest his case on the Ministry's decision. I may say, however, that our own view in this case is that the Ministry has selected its own reason for deciding the case in favour of the Corporation, but has not shown that it intended in any way to adopt any other reasons as grounds for its decision. We accordingly would hold if necessary that we ought only to take into account the reasons given by the Ministry for its decision and that it is not open to us to consider the local authority's reasons.

Following the Ministry's rejection of the claimant's appeal and within the period allowed by the 1944 Act, a claim was made by him under section 6(4) of the said Act for compensation in respect of alleged injurious affection of his property by reason of the planning decision. On such a claim he may be awarded such compensation "as he would be entitled to obtain under the principal Act" (i.e. the Planning Act of 1931) "if such injurious affection had been suffered "as a consequence of the coming into operation of a planning "scheme."

It is now clear law (see per Viscount Simonds in *Belfast Corporation v. O. D. Cars*[1]) that section 6(4) of the 1944 Act incorporates a reference to section 10(2) of the Act of 1931 and, consequently, if it can be shown that the reason for refusal of an interim development application is one which:— (a) prescribes the space about buildings or, (b) limits the number of buildings to be erected or, (c) prescribes the height or character or user of buildings or, (d) prescribes a standard of net annual value for buildings, then in any such case property shall not be deemed to be injuriously affected and therefore in such cases a person will not be entitled to any compensation.

Accordingly, it becomes necessary to examine the Ministry's decision and the reasons therefor to find out if any of the items mentioned in (a) to (d) are given as a ground of refusal. We should say that by reason of the Corporation's concession it is only necessary to see if the decision is based on a reason which "limits the number of "buildings." It is contended that the decision of the Ministry bears internal evidence that it is not a complete prohibition on buildings and that it is to be inferred from it that such buildings would be permitted as would not interfere with the amenities of the area. In the decision emphasis is put on "the meadows containing specimen trees "and fringed by plantations.... it is one of the properties which "gives the slopes of the Holywood Hills their pleasant character."

[1] [1960] A.C. 490, 516; [1960] N.I. 60, 84.

This introduction suggests to us that the decision means that this natural trinity of meadows, trees and plantations which merges into a unity of beauty is something which ought to be preserved in its entirety. It is argued however for the Corporation that the phrase "It considers that to enable the development to be carried out it "would be necessary to remove many of the trees and it considers "that these should be preserved" suggests that a development which permitted the preservation of the trees or many of them would be permitted. If it was intended to mean that, it could have been stated in plain terms, and unless it is stated in plain terms we would not be prepared to say that it fell within section 10(2). It is not enough in our view to leave these matters to be inferred.

Supposing however that it can be accepted that inferentially the decision indicates that some building may take place provided that it does not interfere with many of the trees; then, it is said, a limitation is good which refuses permission to build houses except where the trees are not interfered with. The limitation, so it was argued, was such a one "as would preserve the trees and amenities." Such a decision would be more easily and aptly formulated as a grant of permission subject to conditions. But the more one considers the matter the more clearly does it appear that no clear or specific limitation was imposed in this case in the decision which was a refusal of the application. Thus, even if the inference suggested can be drawn it is too vague and ambiguous to create a valid limitation. As the matter stands before us it is not open to consider whether the decision could have been given any greater validity if drawn as a grant subject to conditions.

Having formed the opinion as set out above we do not propose to decide whether a limitation or condition could be effective within section 10(2) which expressly stated that the building of houses was not to exceed such number as would not cause a removal of many trees. It may be that a valid limitation of the *number* of buildings to be erected does involve some kind of numerical statement, or some limitation which is reasonably specific and sets some standard which could be readily appreciated by a developer. This is however a difficult terrain into which we do not propose to enter in this case.

Having regard to the conclusion to which we have come above it is not necessary to decide whether the letter of December 18, 1958, substantially complies with the conditions necessary to constitute a valid certificate by the Ministry to establish "reasonableness" under section 10(2). This letter was written almost exactly a year prior to

the decision of the House of Lords in the case of *Belfast Corporation v. O. D. Cars*[1] in which Viscount Simonds and Lord Radcliffe deal with the form and authentication of such a certificate. No useful purpose would be served by our stating our opinion by an obiter expression on the certificate in this case, but we would say that it would be desirable in order to avoid challenge on the matter that in future cases such certificates should adhere closely to the directions given in the case cited.

We would therefore answer question (1)—"Yes."

As to question (2) which inquires whether section 10(2) of the 1931 Act is ultra vires the powers of the Parliament of Northern Ireland because of the provisions of section 5 of the Government of Ireland Act, 1920, we simply say that we consider ourselves bound by the decision in *Belfast Corporation v. O. D. Cars*[1] and we declare the section valid in its application to the facts in this case and would answer the question as follows—"Legally valid."

We might also conveniently say here that we take the same view as to section 18 of the Roads Act (Northern Ireland), 1948, and would answer question (4), which relates thereto,—"Legally valid."

We should perhaps say that counsel for the claimant did not argue these two matters but merely desired to keep the points open.

Question (5), which we have already indicated is governed by the case of *O. D. Cars*[1], falls therefore to be answered—"Yes." No contention was raised against answering the question in this way.

We now turn to consider question (3) which deals with the effect of section 10(1) of the 1931 Act. This section provides as follows:—

"Where property is alleged to be injuriously affected by reason of "any provisions contained in a planning scheme, no compensation "shall be paid in respect thereof if or so far as the provisions are also "contained in any public general or local Act, or Order having the "force of an Act of Parliament, in force in the area, or are such as "would have been enforceable if they had been contained in byelaws "made by the local authority, and would (whether contained in such "Act or Order or byelaws) have been enforceable without payment "of compensation."

Because of this provision it is argued that section 18(1)(c) of the Roads Act (Northern Ireland), 1948, being the provision of a public general Act, is applied to this case. The section provides that "any

[1] [1960] A.C. 490; [1960] N.I. 60.

"person who without the consent of the road authority.... (c) con-"structs, forms or lays out any means of access to a road.... shall be "guilty of an offence and shall be liable on summary conviction there-"of to a penalty not exceeding ten pounds."

Two of the reasons given by the Corporation for refusal of the interim development application were that "the steep and winding "character of the Glenmachan Road, even if widening were carried "out, would make frontage development undesirable in the interests "of road safety" (Reason 2). And again, under the general provisions following the reasons, it is stated that the application is refused inter alia "to safeguard road users."

It was argued that these provisions, if they are applicable, echo those that govern the grant of a consent by the road authority and which can be found in section 18(4) of the Roads Act.

Having regard to the ground upon which we decide this point it is not necessary for us to consider whether these reasons are specific enough to make them applicable to this case by reason of what is contained in section 10(1) of the 1931 Act. We have however come to the conclusion that section 10(1) of the 1931 Act is not applicable to this case because before it can be made effective there must be in existence operative reasons for refusal of an interim development application which, if they had been provisions in a planning scheme, would also have been the same as (or substantially the same as) provisions contained in a public general Act (i.e. the Roads Act (Northern Ireland), 1948, in this case). It is indeed admitted that section 10(1) can only be made applicable if there is a planning decision incorporating provisions similar to those in the Roads Act (Northern Ireland), 1948. We have already pointed out that we do not consider that the Corporation's reasons which we have set out above, remained operative after the Ministry had decided the appeal and given its own reasons for so deciding. Accordingly, it is our opinion, and we so decide, that section 10(1) does not apply to this case there being no planning provision in existence to bring it into effect.

It therefore follows that the answer to question 3 is—"No."

We have not attempted to solve the various implications in law and of fact which might arise from the application of section 18 of the Roads Act (Northern Ireland), 1948, in its own right to a claim for compensation under the Planning Acts. We are not required to answer any question on this subject and it was not debated before us, and in any event it is difficult to see how it would arise where the

effect of a planning decision sterilises development. It does however seem to raise difficulties which will require clarification whether by statute or otherwise.

The result of our decision is that the claimant will be awarded under clause 1 of the award £6,200 and under clause 4 the costs of and incidental to the arbitration.

We also award the claimant his costs as against the Corporation of the proceedings before us to be taxed in default of agreement.

Declaration accordingly.

Solicitor for the local authority: *John A. Young.*

Solicitors for the claimant: *White, McMillan & Wheeler.*

S.M.M.

McCLATCHEY v. REILLY AND ULSTER BANK, LTD.[1]

Practice—Interrogatories—Interrogatories for examination of two defendants—Bad if no indication which interrogatories each of two defendants is to answer—Delivery after action listed for trial not ground for setting aside or striking out if party being interrogated not prejudiced in the conduct of his case—Practice in England different from that obtaining in Ireland—R.S.C. Or. 31, *rr.* 1, 7.

Interrogatories for the examination of two or more defendants are bad if, when delivered, they do not have a note at the foot stating which of such interrogatories each of the defendants is required to answer.

Interrogatories will not be set aside or struck out under Order 31, rule 7 merely on the ground that the application to deliver them is not made until the action is listed for trial.

Observations by Black L.J. on the difference between the present practice in England with regard to applications for leave to deliver interrogatories and the practice obtaining in Ireland.

MOTION to set aside or strike out interrogatories.

In an action for personal injuries in which there were two defendants notice of trial was served on May 25, 1959, and the action was listed for trial in the provisional list for the week commencing June 8, 1959. On that and on two subsequent occasions the action was taken out of the list for the reason that the plaintiff's medical witness was ill and would be unable to attend the trial. On January 15, 1960, the plaintiff applied for and obtained leave to deliver interrogatories for the examination of both defendants. The application was made ex parte and the proposed interrogatories were handed up for perusal by the judge who considered them before granting leave. The interrogatories when delivered did not contain a note at the foot stating which of them were to be answered by each defendant. The defendants served notice of their intention to apply to the court for an order under Order 31, rule 7 that the interrogatories should be set aside or struck out, and each of their solicitors filed affidavits setting out the history of the action and stating that prior to receiving letters from the plaintiff's solicitors dated January, 7, 1960, there had never been any mention of a need to deliver interrogatories.

Watt for the first defendant.
Shaw for the second defendant.
Babington for the plaintiff.

Cur. adv. vult.

[1] In the Queen's Bench Division before Black L.J.: Feb. 19, Mar. 25, 1960.

BLACK L.J.: In this case the plaintiff obtained leave on January 21 of this year to deliver interrogatories to both the defendants and the present application is made under Order 31, rule 7 to have those interrogatories set aside on the ground that they were exhibited unreasonably or vexatiously, or to have them struck out as being prolix, oppressive, unnecessary or scandalous. The defendants also object to the interrogatories on the ground that they do not comply with Order 31, rule 1, in that there was no note at the foot stating which of the interrogatories each of the defendants was required to answer.

In support of the contention that the interrogatories were exhibited unreasonably or vexatiously, and that they were oppressive and unnecessary, the solicitors for each defendant have sworn affidavits setting out the history of the action. It appears therefrom that notice of trial was served on May 25, 1959, and that the action was subsequently listed for trial on three occasions but each time the plaintiff asked the defendants to consent to having it taken out of the list for the reason that the plaintiff's surgeon was ill and would be unable to attend the trial. Then on January 7, 1960, the defendants' solicitors received letters containing interrogatories from the plaintiff's solicitors, and on January 15, Curran L.J., on the application of counsel on behalf of the plaintiff, made an order giving leave to deliver these interrogatories. In seeking to have that order set aside the defendants say that in circumstances where, but for the surgeon's illness, the plaintiff appeared ready and able to prosecute his claim on at least three earlier occasions, it would be unreasonable and oppressive to have to answer interrogatories at this stage.

Now if Mr. Rosser or Mr. Jefferson had been able to show in their affidavits that the delay in asking for interrogatories had handicapped their clients in some way—e.g. if a witness had died or gone away, or if there had been a physical alteration of the premises where the accident occurred—I would have been quite prepared to strike out these interrogatories on the ground that they were oppressive. Nothing like that, however, appears from the affidavits and in default of some such information I am unwilling to penalise the unfortunate man who met with the accident.

That, however, is not the end of the matter. In order to ascertain the practice with regard to interrogatories one has to go back to what is and has been the position under the respective Judicature Acts in Ireland and in England. In England, after the Judicature Act of 1873, an application to deliver interrogatories was made ex parte,

and it was undoubtedly not the practice then, when making such an application, for counsel to hand up a whole set of interrogatories for perusal by the judge. A judge could not be expected to consider the individual interrogatories in the presence only of counsel for one side.

Then in 1893 a new rule of Order 31 was introduced and it stated that "on an application for leave to deliver interrogatories the "particular interrogatories proposed to be delivered must be sub- "mitted to the Court or Judge," and later, in 1919 there was substituted the present Order 31, rule 2 of the English Rules. That rule is in the following terms: "A copy of the interrogatories proposed to be "delivered shall be delivered with the summons or notice of applica- "tion for leave to deliver them.... and the particular interrogatories "sought to be delivered shall be submitted to and considered by the "Court or Judge." That is the present rule in England and there is no equivalent of the old rule 7 which would appear to have lost its force after 1893 and was in fact annulled in 1917: see the Annual Practice, 1959 ed. p. 708.

The practice, therefore, in England is that interrogatories are settled by someone acting in a judicial capacity, but in Northern Ireland we still have the old practice; rules 1 to 7 of our 1936 Rules simply reproducing the Irish 1905 Rules. Here the application is still ex parte and while it is, of course, necessary to satisfy the judge that the case is a proper one for the delivery of interrogatories, he does not take the responsibility of approving or disapproving of the interrogatories in detail. When they are delivered, if they come within rule 7, the party receiving them may move to have them set aside or struck out, but the more ordinary course to follow is that under rule 6 which provides that "any objections to answering any one or "more of several interrogatories on the ground that it or they is or "are scandalous or irrelevant, or not bona fide for the purpose of the "cause or matter, or that the matters inquired into are not sufficiently "material at that stage, or any other ground, may be taken in the "affidavit in answer." Our present Rules have not altered the old Rules by one single word and the position is that which obtained in England before 1893 and which is illustrated by *Oppenheim v. Sheffield*[1] and set out in Wylie's Judicature Acts, 1906 ed. as follows: "It is not necessary for the applicant to produce a copy of the "proposed interrogatories; it is sufficient for him to state their "general nature and scope so as to enable the Court to decide "whether he is entitled to the whole or part of what he asks, and if a

[1] [1893] 1 Q.B. 5.

"copy be produced the Court shall not settle them or decide upon the "relevancy or irrelevancy of specific interrogatories so as to allow or "disallow them."

Now I am aware that there has been an inclination here towards a change to the new English practice, but that new English practice is founded on new rules. In our jurisdiction, however, there has been no corresponding change of rules to found or justify a change from the old position. In this case what should have been done was simply to give leave to deliver interrogatories without going any further into detail at that stage. So far as the present application is concerned there is nothing in the affidavits to justify the assertion that the interrogatories were oppressive or should otherwise be struck out under Order 31, rule 7, but in my opinion they were bad in that it was not stipulated which interrogatories should be answered by each of the defendants. I propose therefore to set aside the order of Curran L.J. of January 15, and in lieu thereof give the plaintiff liberty to deliver interrogatories for the examination of each defendant.

As the plaintiff was at fault in not stating who was to answer which interrogatories and as the defendants' main contention was based on what I think was an untenable ground I shall make no order as to costs.

Order accordingly.

Solicitor for the first defendant: *Ronald Rosser.*

Solicitors for the second defendant: *C. & H. Jefferson.*

Solicitors for the plaintiff: *N. & F. Tughan & Walmsley.*

S.M.M.

WELLS v. WELLS[1]

Judicial separation—Jurisdiction—Matrimonial home within jurisdiction when event occurred upon which claim for separation based—Respondent husband neither domiciled nor resident within jurisdiction—Matrimonial Causes and Marriage Laws (Ireland) Act, 1870 (33 & 34 *Vict. c.* 110), *ss.* 7, 13—*Matrimonial Causes Act (Northern Ireland)*, 1939 (2 & 3 *Geo.* 6 *c.* 13), *s.* 28.

In addition to having jurisdiction in cases where the parties are domiciled or resident within the jurisdiction, the High Court has jurisdiction to entertain a petition for a decree of judicial separation when the parties had a matrimonial home within the jurisdiction at the time when the events occurred upon which the claim for separation is based.

PETITION by a wife for judicial separation on the grounds of desertion.

The respondent, a serving soldier whose domicile of origin was English, married the petitioner in Northern Ireland in 1932. Thereafter, the parties lived together at the home of the petitioner's aunt at 148, Earl Street, Belfast, and at various addresses in England while the respondent was serving there. Immediately before the outbreak of war in 1939 the respondent sent his wife and the two children of the marriage back to Belfast to live with her aunt at 148, Earl Street. He spent leaves with his wife and family in Belfast in 1940 and 1941, but was later posted overseas. Thereafter he was a prisoner of war for about three years until he was liberated in 1945, when he returned to Belfast and spent a further period of leave with his family at 148, Earl Street. The respondent remained in the army, and was subsequently posted to Trieste, where his wife was to join him in 1947, but the international situation prevented this. The parties corresponded with each other until 1950, when the respondent wrote to the petitioner stating that he had left the army and was going to West Africa, that he could not face Belfast and the way of living there, and asking his wife to divorce him.

When the petition was presented in 1958, the respondent was stated therein to be resident at an address in France, where the petition was subsequently served upon him. He did not enter an appearance.

After hearing the evidence, Lord MacDermott L.C.J. was satisfied that the respondent had been in desertion since April 1950, but as the question of jurisdiction seemed to him debatable, he adjourned the hearing for further argument and requested the assistance of the Attorney-General.

[1] In the Queen's Bench Division (Matrimonial) before Lord MacDermott L.C.J.: April 17, May 15, 22, 1959; Jan. 20, Mar. 3, 1960

McCollum for the petitioner.

Maginess Q.C., *A-G* and *McConnell* as amici curiae.

The respondent did not appear and was not represented.

Cur. adv. vult.

LORD MACDERMOTT L.C.J. In this suit Mrs. Teresa Wells, the petitioner, seeks a judicial separation from her husband, the respondent, on the ground of his desertion. The respondent was served on January 9, 1959, at an address in the Pas-de-Calais, France, where he was then living, but he has not entered an appearance or taken any part in the proceedings. When the case came on for hearing in the undefended list I was satisfied, on the testimony of the petitioner and the correspondence which was put in evidence, that the respondent had been in desertion since April 1950, and that the petitioner was clearly entitled to the relief sought if the court had power to grant it. As the question of jurisdiction seemed debatable and of some general importance I adjourned the hearing for further argument and requested the assistance of the Attorney-General. This request, it may be observed, was not made under section 11 of the Matrimonial Causes Act (Northern Ireland), 1939, as, for some reason, section 11 does not apply to suits for judicial separation. That, however, did not prevent the Attorney-General from attending as amicus curiae to argue the point thus remaining for decision and I am much obliged to him, and also to Mr. McCollum who represented the petitioner, for their helpful submissions when the case was relisted.

The facts and circumstances relevant to the question of jurisdiction may be stated as follows. The parties were married in Northern Ireland at St. Patrick's Roman Catholic Church, Belfast, on August 1, 1932. The petitioner was a native of Northern Ireland. The respondent was then a serving soldier in the British Army. He was born in Cardiff and there can be no doubt that his domicile of origin was English. Mr. McCollum, for the petitioner, sought to show that the respondent had acquired a Northern Ireland domicile after his marriage, but I cannot so hold on the evidence which was insufficient to show any change of domicile on the respondent's part. After living some months in Londonderry, where the respondent was stationed at the time of the marriage, the parties went to live at 148, Earl Street, Belfast, in the house of the petitioner's aunt. That move followed the respondent's transfer to Belfast. He lived with his wife at 148, Earl Street, as his military duties permitted, and there the first of the two children of the marriage was born on May 1, 1933. This remained the

position until shortly before the Second World War. The respondent was then transferred to the London district and the petitioner and her child joined him and lived in married quarters and at various other addresses there. The second child was born on June 6, 1939. The petitioner came back from England to 148, Earl Street, Belfast, for that event. The baby was in hospital for some weeks and on its discharge the petitioner rejoined her husband at Kensington Barracks, London. That was just a few weeks before the outbreak of hostilities. Then, when war seemed imminent, the respondent, in August 1939, sent his wife and children back to Belfast to live at 148, Earl Street. There can be no doubt that this step was taken by the respondent in order to get his family out of harm's way and the dangers which were thought to threaten London at that time. There can be no doubt either that 148, Earl Street was the natural place to send the petitioner and her children to in those circumstances. Her parents were long since dead, but her aunt, as we have seen, had provided the parties with a home at that address for most of their previous married life. The petitioner has since lived at 148, Earl Street. The respondent was posted to France in September 1939, but came over to Belfast to spend his leaves with the petitioner subsequent to his return to England in 1940. He spent Christmas of that year at 148, Earl Street with his wife. About this time he became a commissioned officer and in 1941 was posted overseas again. After that he was a prisoner of war for some three years. He was liberated in April 1945, and thereupon rejoined the petitioner at 148, Earl Street where he spent a two months' leave. Then he was posted to Glasgow and from there to Trieste. Before going to Trieste he came back on leave to Belfast. Relations between the spouses seem to have been normal at this time and when the respondent went to Trieste they corresponded regularly. Arrangements, indeed, were on foot for the petitioner to join her husband there but these arrangements had to be cancelled owing to the development of a disturbed situation at that station in or about the year 1947. The parties have not met since the respondent went to Trieste. He appears to have been transferred from there to Tripoli and after that to Palestine and possibly to some other places in the Middle East. Letters were still passing, but the correspondence stopped with the letter from the respondent dated April 11, 1950, which was in these terms:—

"C/o. The Midland Bank Ltd.,
Tetbury,
Glos.

11th April, 1950.

"Dear Mick,

"By the time you get this I shall be on my way to West Africa as a "civilian.

"I finished with the Army on April 1st by resigning.

"I have arranged with my bank to pay you £5 a week which is all "I can afford out of my salary.

"Belfast and the way of living there I cannot face.

"Will you consider divorcing me? Your religion probably will "stop that—it doesn't worry me in the least.

"Write to the above address—it is the only one available and when "I can I will write there for mail as I shall be travelling most of my "time.

"I am sorry about this but we have had very little time together in "the last ten or eleven years and our lives are totally different.

"What you tell the children I leave entirely to you.

"In the hopes that you will divorce me and leave us both free.

"Bill."

After getting that letter the petitioner got regular payments from her husband but heard nothing of him and had no communication from him until she got a final letter dated June 14, 1957. It reads:—

"Tilbury,
14th June, 1957.

"Dear Madam,

"I have to inform you that for some time I have had no work and "now I have reached the end of my money. When you receive this I "shall be on my way to South America. If and when I find further "employment I will commence to pay you again.

"I have no doubt that with the two children working and your "two P.O. Accounts you will not be in want.

"Yours faithfully,

"J. W. Wells."

This summary of the facts may be concluded by stating that the petition was presented on October 15, 1958, and that the respondent is therein described as resident in France at the address at which he was subsequently served.

It may be taken as now settled that domicile gives jurisdiction in suits for judicial separation: see *Eustace v. Eustace*[1]. As already indicated, however, the petitioner cannot avail herself of this basis of jurisdiction as the evidence does not warrant the conclusion that the respondent ever made Northern Ireland his domicile of choice. Nor does the fact that the marriage was celebrated in Northern Ireland assist the petitioner in showing jurisdiction. In *Addison v. Addison*[2], I held that this court had jurisdiction to annul void or voidable marriages celebrated in Northern Ireland, but neither that decision nor the authorities on which it was founded can be extended to suits, such as this, which postulate a valid marriage, and I was not asked to hold otherwise. The statutory provisions as to jurisdiction do not help the petitioner either. Section 26 of the Act of 1939 applies to suits for judicial separation but cannot be invoked where the husband has not been domiciled in Northern Ireland. And the enabling provisions of section 3 of the Marriage and Matrimonial Causes Act (Northern Ireland), 1946, and of section 1 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1951, are restricted to suits for divorce or annulment.

In this state of affairs I was referred to sections 7 and 13 of the Matrimonial Causes and Marriage Laws (Ireland) Act, 1870, and section 28 of the Act of 1939 and asked to apply "as nearly as may be" the principles and rules respecting divorces a mensa et thoro which were observed by the ecclesiastical courts in Ireland before their matrimonial jurisdiction was transferred to the civil courts. There can be no question that the sections mentioned are in point. The judicial separation of to-day continues the form of relief granted by the ecclesiastical courts as a divorce a mensa et thoro, and although section 13(1) of the Act of 1939 has enlarged the grounds for relief, the character of the jurisdiction remains much as it was and suits for judicial separation are expressly mentioned in section 28 of the Act of 1939.

This statutory link with the past enables it to be said, for reasons which are set out in *Addison v. Addison*[2] and in *Mason v. Mason*[3] and which I need not now restate in detail, that, if the respondent was

1 [1924] P. 45.
2 [1955] N.I. 1.
3 [1944] N.I. 134.

resident in Northern Ireland at the material time, this court would have jurisdiction to grant the relief sought. A residential basis for jurisdiction had long been accepted by the ecclesiastical courts in Ireland as the Statute of Citations (23 Hen. 8, c. 9), though not applying to Ireland, was regarded as declaratory of the common law which, in all relevant respects, was the same there as in England. This enactment forbade the ecclesiastical courts, with certain exceptions which are not now in point, to cite or summon a person to appear out of the ecclesiastical jurisdiction or diocese where he should be "inhabiting " and dwelling." Questions of service and jurisdiction may be closely related on occasion, but the law, as thus affirmed, concerned the latter rather than the former, and those present in the diocese merely as travellers or temporary visitors would not normally be regarded as "inhabiting and dwelling," or, to use the modern expression, as residing therein, no matter how much their physical presence would have facilitated service. And it seems no less clear that, if a respondent was ordinarily resident within the diocese, he would not evade the jurisdiction of its spiritual courts simply by absconding. If not served personally, he could be served *viis et modis*, and his bodily absence from the diocese would not necessarily mean that he was not "inhabiting and dwelling" within it at the material time.

In most of the reported cases the material time is that of the initiation of the proceedings, while the residence held sufficient to attract jurisdiction is residence which is actual rather than notional in nature and which, without having to be described as permanent, has at least something about it which is more than casual or transient. In some of the decisions which fall within this category the degree of permanence has not been marked. In *Armytage v. Armytage*[1] for example, the court entertained a suit for a judicial separation because the parties were resident within its jurisdiction when the suit commenced, though, in fact, the respondent husband, a domiciled Australian, had followed his wife to England for the purpose of obtaining the custody of his children, whom she had taken there, and had been less than a year in that country when served with the petition. A recent instance will be found in *Matalon v. Matalon*[2]. In that case the wife, an Englishwoman, had married a husband who was domiciled and resident in Jamaica. They had settled there after the marriage, which took place in 1946, and a child was born there in 1947. In 1949 the wife returned to England with the child. Later that year the husband came to England for business purposes and

[1] [1898] P. 178.

[2] [1952] P. 233.

also to secure the custody of his child. In October 1950 he brought proceedings for custody, but these were stayed on the wife presenting a petition for judicial separation, on the ground of cruelty, later the same month. The husband stayed in England until December 1950, living in hotels and boarding-houses. He contended that he was not resident in England and that the court had no jurisdiction to hear his wife's petition. The Commissioner decided against this contention and the case then went to the Court of Appeal where the appeal was dismissed. The judgment of the court is that of Hodson L.J. who, after observing that the point taken was that the quality of the husband's residence was insufficient to give jurisdiction, considers the authorities and comes to the conclusion that the facts warranted an assumption of jurisdiction.

In my opinion the petitioner cannot found her case on these decisions or on the line of authority which they represent. When the petition was presented on October 15, 1958, the respondent had been out of Northern Ireland continuously for years and was not, in any literal sense of the word, resident there.

There is, however, another line of authority, relating to judicial separation and the restitution of conjugal rights, on which the petitioner relies. The proposition sought to be extracted from the cases in this category recognises the duty of the spiritual courts to protect the matrimonial home; but it is founded on residence of a notional rather than an actual kind, and the material time for applying the test it lays down may be earlier than the commencement of proceedings. The proposition is thus stated in Dicey's Conflict of Laws, 7th ed. Rule 46, at p. 335: "The court has jurisdiction to entertain a "suit for judicial separation or the restitution of conjugal rights.... "when the parties.... (3) had a matrimonial home in England when "the events occurred on which a claim for separation is based, or "their cohabitation ceased....."

If this is true for England it must also be true for Northern Ireland, as the foundations of the jurisdiction are common to both countries. A reference to the authorities may begin conveniently with a passage from the well-known judgment of James L.J. in *Niboyet v. Niboyet*[1], where he says: "If I were asked to define, and it were necessary to "define, what in the particular case of matrimonial infidelity con- "stituted a matter matrimonial in England at the time when the Act "was passed, I should define it to be a case of infidelity where the "matrimonial home was in England—the matrimonial home in which

[1] (1878) 4 P.D. 1, 6.

"the offended husband ought to be no longer bound to entertain the "unchaste wife, or in which the chaste and offended wife ought to be "no longer bound to share the bed and board of the polluted husband "—the matrimonial home, the purity of which was under the watch "and ward of the church there."

I do not think this excerpt was intended to belittle the general importance of actual residence as a basis of jurisdiction, but it is noteworthy for the mention it makes of the matrimonial home and of the duty of the church as respects the matrimonial home. In *Armytage v. Armytage*[1] there is further reference to the matrimonial home. Gorell Barnes J. there says: "In my opinion, if the parties had a "matrimonial home, but were not domiciled within the jurisdiction "of an Ecclesiastical Court, that Court would have interfered, if "the parties were within the jurisdiction at the commencement of "the suit, to protect the injured party against the other party in "respect of the adultery or cruelty of the latter, and I can find no "authority for the suggestion made by the respondent's counsel that "such interference would be limited to cases where the offence "complained of was committed within the jurisdiction."

There is certainly nothing there to reject a test based on actual residence at the commencement of the suit, but, again, the church's interest in the matrimonial home is emphasised. In *Christian v. Christian*[2] Sir Francis Jeune P. had to deal with an application in a wife's suit for judicial separation on the grounds of cruelty, desertion and adultery. The husband had taken proceedings in Scotland, where he was allegedly domiciled, for a dissolution of the marriage and his wife moved to restrain the prosecution of those proceedings until the husband's act on petition challenging the jurisdiction of the English courts had been determined. In the course of his judgment the President said[3]: "We are really engaged with a question of juris- "diction..... The point was strongly pressed upon me that the "question of jurisdiction is different in cases of divorce and in cases "of judicial separation, and I think Mr. Priestley", counsel for the respondent husband, "made good his point that suit for judicial "separation may be founded upon matrimonial residence only as "distinguished by our law from domicile....." When one turns back to the argument in that case Mr. Priestley is reported as submitting that "it is clear that a matrimonial home would suffice to "found jurisdiction for judicial separation." I cannot read this case

[1] [1898] P. 178, 194.
[2] (1898) 78 L.T. 86.
[3] Ibid. 88.

as drawing any significant distinction between actual residence and a matrimonial home within the jurisdiction, but the expressions "matrimonial home" and "matrimonial residence" seem to have been regarded as synonymous. In *Perrin v. Perrin*[1] the matter was carried a stage further though the case concerned a question of service. The suit was by a wife for restitution of conjugal rights. The domicile and matrimonial home of the parties was in England, but the husband had left his wife in 1912, the year before the petition was filed, and was served in Canada where he was then residing. Difficulty had arisen because no express provision was made for service out of the jurisdiction in restitution cases, and Sir Samuel Evans P., in the course of a considered judgment, observed[2]: "I think it very desirable that "there should be no longer any doubt with reference to the practice "as to service of proceedings in suits for restitution of conjugal rights, "not merely in cases where the parties are domiciled in England, but "also in cases where the parties are resident here. I think by far the "best way to deal with these matters is to put an end to all doubts and "to deal not only with service of proceedings in cases of domicil, but "also in cases of residence in this country. I have accordingly "determined to make new rules dealing with these matters, and "these rules will, I hope, in due course become law under the pro-"visions of the Matrimonial Causes Act, 1857." The President then set out the terms of the proposed new rules, the first of which was to the following effect: "Rule 221. In a suit for restitution of conjugal "rights, when it is stated in the petition, either that the parties to the "suit were domiciled in England at the time of the institution thereof; "or that they had a matrimonial home in England at the date when "their cohabitation ceased; or that they were both resident in "England at the time of the institution of the suit, the petition and "citation may be served either within or without His Majesty's "dominions." This rule duly became a Rule of Court and continued in force for some years until replaced by a more general provision allowing service of any petition or decree within or without the Sovereign's dominions. The implications of the rule thus made on the initiative of Sir Samuel Evans are of importance. Its purpose seems clearly to have been to authorise service at home or abroad in cases where there was, prima facie, jurisdiction to entertain the suit, and its terms appear to me to lead to the inescapable conclusion that such jurisdiction would exist, in the case of a suit for restitution, if any one of the three conditions specified in the rule were satisfied. It is true that in his judgment the President referred only to cases of domicile

[1] [1914] P. 135. [2] Ibid. 139.

and cases of residence. Probably he regarded the place of the matrimonial home as, at any rate prima facie, the place of residence for the purposes of jurisdiction; but, however that may be, I think there can be no doubt at all that the reference in the rule to the matrimonial home at the date when cohabitation ceased was meant to describe an accepted basis of jurisdiction. I can see no other ground which would explain or justify its inclusion.

I must next mention the case of *Ward v. Ward*[1]. That was a suit brought by a wife for judicial separation on the ground of desertion. The respondent husband, a domiciled Englishman, was an officer in the Indian Army and was serving with it when service of the petition was effected upon him in Simla. The matrimonial home was in England and the respondent's absence in India was due to the demands of his military duties. As the question whether domicile would found jurisdiction in such a case was then in doubt, counsel for the petitioner argued, alternatively, that the court could entertain the petition on the ground that the matrimonial home was within the jurisdiction. In dealing with this further argument the learned President observed that he had come to a conclusion founded on "matrimonial residence." He is then reported as saying[2]: ".... that "the respondent, a domiciled Englishman, was an officer serving in the "Army, and that therefore any temporary residence of his while so "employed would be determined by his qualified superior officers "quite independently of his own personal volition. At the time of "the service of the petition the respondent happened to be stationed "in India, although his true matrimonial and conjugal home had "been in England, and he had been, and still was, possessed of a "property in this country and had never evinced any disposition to "abandon it as his natural and permanent home. He (the learned "President) was satisfied that on the facts the Court had jurisdiction "to grant the petitioner a decree for judicial separation, and he "would therefore grant the decree prayed for....." *Raeburn v. Raeburn*[3], was also a suit for judicial separation. There Lord Merrivale P. held he had jurisdiction to entertain a wife's petition on the ground that her husband, the respondent, was resident in England at all material times, though, in fact, he was said to be actually in Scotland at the time of the filing of the petition. The parties were domiciled in Scotland and maintained two homes, Wood End in Dumbartonshire, Scotland, and Overdale in Surrey, England. As differences developed between them the wife continued to live at

[1] (1923) 39 T.L.R. 440.
[2] Ibid. 441.
[3] (1928) 44 T.L.R. 384.

Overdale and the husband resorted there less and less and had only done so on three brief occasions during the period from 1925 until the filing of the petition in 1927. But he had maintained Overdale and paid the servants' wages, and Lord Merrivale felt himself bound, in the circumstances, to hold that he was resident in England. These circumstances are summarised in a passage towards the end of the judgment, which reads thus[1]: "That the relation of the spouses was "for years unsettled and unhappy, and that in consequence the "respondent was commonly absent from Overdale, seem to me mere "incidents of their mutual discontents. During the whole time he had "the right to be whenever he would in the home he maintained and "when he thought fit, though but rarely he acted upon his rights. "A seaman ordinarily absent from this country is resident in the "home which he provides here for his wife. So is a man of business "whose employment keeps him constantly abroad."

I now turn to *Milligan v. Milligan*[2]. In that case Henn Collins J. had to consider an issue of jurisdiction in a wife's suit for restitution of conjugal rights. The husband appeared under protest, contending that he was domiciled in Scotland, that the parties were not both resident in England at the time of the institution of the suit, and that they did not have a matrimonial home in England when cohabitation ceased. It was conceded that the husband was neither domiciled nor resident in England when the suit was instituted, and the issue of jurisdiction was directed to the point respecting the existence of a matrimonial home in England when cohabitation ceased. The learned judge, after dealing with the authorities and the transfer of jurisdiction from the ecclesiastical to the civil courts, says this[3]: "Let me "take an extreme case. Suppose a married couple, of foreign domicil, "but living here, left their home in one town to go to a new one a few "miles away, and that, on the way, the husband deserts his wife. Has "she no remedy here? Is she relegated to the tribunals of her hus- "band's domicil? I answer: 'No,' if only for the reason that the "husband cannot be allowed to take advantage of his own wrong."

The facts in that case raised a question as to when cohabitation ceased and it is not, therefore, on all fours with this suit; but there can be no doubt that the respondent's protest was struck out and the petition allowed to proceed on the basis that the existence of a matrimonial home in England when cohabitation ceased gave jurisdiction.

[1] (1928) 44 T.L.R. at 386.
[2] [1941] P. 78.
[3] Ibid. at 84.

In the present case I entertain no doubt that the parties established a matrimonial home at 148, Earl Street, Belfast, and that they maintained a matrimonial home there, notwithstanding the exigencies of the respondent's military service, from the outbreak of war in 1939 until his desertion in 1950. It was the respondent who moved his wife to this address in Belfast, and it was there she brought up her family and received her husband whenever his service allowed him to come home. It may well be said that in other circumstances the parties might have established themselves in some more permanent way and without recourse to the hospitality of the petitioner's aunt, but as things were, I think they did what they could.

I therefore find that the matrimonial home was within the jurisdiction of this court when cohabitation ceased, and am of opinion, on the authority of *Milligan v. Milligan*[1] and the inference to be drawn from *Perrin v. Perrin*[2], that there would be jurisdiction to entertain the present suit had it been a suit for restitution of conjugal rights. The question then arises whether this test of jurisdiction can be applied to suits for judicial separation. *Ward v. Ward*[3] and also, I think, *Raeburn v. Raeburn*[4] support an affirmative answer to this question, and I can see no sound ground for distinguishing between these two forms of relief from the point of view of jurisdiction. I would, indeed, be reluctant so to hold if the decree in a suit for judicial separation involved a change of status. In *Firebrace v. Firebrace*[5], Sir James Hannen P. seemed to think that decrees for judicial separation, like decrees for divorce, did affect status, while decrees for restitution of conjugal rights did not. But in *Anghinelli v. Anghinelli*[6] the Court of Appeal did not take this view. Swinfen Eady M.R. said[7]: "I do not consider it to be settled that a decree for "judicial separation will affect the status of married parties." And Warrington L.J. added[8]: "I am not, however, prepared to accept the "view that a decree for judicial separation does affect the status of "the parties....." These dicta were obiter, but, if I may say so with respect, I prefer them to that expressed in *Firebrace v. Firebrace*[5]. A judicial separation, while suspending some of the obligations of marriage, recognises the bond and leaves the parties still husband and wife. And, so far as the public interest is concerned, there seems to be no good reason for denying the jurisdiction available in restitution suits to proceedings for judicial separation. The enforce-

[1] [1941] P. 78.
[2] [1914] P. 135.
[3] (1923) 39 T.L.R. 440.
[4] (1928) 44 T.L.R. 384.
[5] (1878) 4 P.D. 63, 67-8.
[6] [1918] P. 247.
[7] Ibid. 254.
[8] Ibid. 256.

ment problem in the latter is no greater and may well be less than in the former; and if jurisdiction cannot be exercised in suits for judicial separation by the court of the matrimonial home the result may often be to deny the wronged spouse any relief. That, I think, is the case here. If the petitioner took proceedings in England she might find that the respondent had neither residence nor domicile there, and, apart altogether from considerations of expense, proceedings in France could promise no greater certainty. Even if French law offered relief, it would be rash to assume that the respondent could be made amenable there. He seems to have been of a roving disposition and there is nothing to indicate that his present address is permanent. I do not, however, rest my decision on the hardship of the case further than to say that such hardship may afford some explanation of how the courts have come to regard the existence of a matrimonial home as a basis of jurisdiction.

On the whole case I have come to the conclusion that the learned editors of Dicey are right in relating this basis of jurisdiction not only to restitution of conjugal rights but to relief by way of judicial separation as well. While, as I pointed out in *Addison v. Addison*[1], the words "as nearly as may be" preclude divergence at pleasure from the principles and rules followed by the ecclesiastical courts, they afford some degree of flexibility, and I do not think the decisions favouring the existence of the jurisdiction now invoked ignore those words or are really at variance with the attitude of the courts Christian towards claims of the present kind. The way back to the days of those courts is overgrown and hard to trace, but I incline to the view that if the present suit had been brought before the ecclesiastical court a century ago the petitioner would not have encountered difficulty on the score of jurisdiction, though desertion alone would not then have been enough to found a decree. She would possibly have been unable to ascertain her husband's whereabouts as she has now succeeded in doing, but I do not think his absence would have worried the Ordinary overmuch. With the matrimonial home in his district and a husband who had disappeared, service of the citation *viis et modis* and no appearance would, I believe, have been considered enough.

For these reasons I am of opinion that I have jurisdiction to entertain this petition, and I so hold. I accordingly grant a decree.

Decree nisi.

[1] [1955] N.I. 1.

Solicitors for the petitioner: *James F. Fitzpatrick & Co.*
Solicitor for the Attorney-General: *Chief Crown Solicitor.*

J.P.

REG. v. TAYLOR[1]

Criminal law—Possession of explosive substances for an unlawful object—Consent of Attorney-General to prosecution—Consent given in respect of possession at specified place—Indictment alleging possession in county—Doubt whether conviction related to possession at place specified in consent—Conviction quashed—Explosive Substances Act, 1883 (46 & 47 *Vict. c.* 3) *ss.* 4, 7.

The appellant was indicted at quarter sessions upon three charges arising out of an incident at Derryhealey in the County of Fermanagh on May 25, 1959, the third charge being that he had knowingly had in his possession or under his control explosive substances, to wit, a revolver and five rounds of ammunition, under such circumstances as to give rise to a reasonable suspicion that he did not have the same in his possession or under his control for a lawful object contrary to section 4 of the Explosive Substances Act, 1883. Section 7 of that Act provides that no proceedings in respect of an offence against the Act shall be taken without the consent of the Attorney-General. In this case the consent of the Attorney-General was given in respect of the appellant's possession of the explosive substances "at Derry-"healey, Brookeborough, in the County of Fermanagh," but the indictment merely charged him with having committed the offence "in the County of "Fermanagh."

At the trial, the Crown put in a statement alleged to have been made by the appellant in which he admitted having had the revolver and ammunition at Derryhealey, but in his evidence the appellant denied the statement. He admitted, however, that he had had the revolver and ammunition at his home, which was also in County Fermanagh, about four miles from Derry-healey. The Chairman of Quarter Sessions in his charge to the jury dealt with unlawful possession of explosives in general terms and did not specifically direct the minds of the jury to the question whether the appellant had had the revolver and ammunition in his possession at Derryhealey. The appellant was convicted of the offence.

Held, that since it was not clear that the jury had directed their attention to the charge in respect of which the consent of the Attorney-General had been given, the conviction must be quashed.

APPEAL against conviction. The facts appear sufficiently in the judgment of the court.

Jones Q.C. and *Babington* for the appellant. The charge against the appellant was that of possession of explosives for an unlawful object, but possession of explosives is something which may vary in its nature from time to time; a man might have a revolver and ammunition in a drawer at his home for a long period, but his possession of them might only become possession for an unlawful object when on a particular occasion he took them out to use them for an unlawful

[1] In the Court of Criminal Appeal before Black and Curran L.JJ. and Sheil J. Nov. 20, 1959.

purpose, and might cease to be for an unlawful object if he later returned them to the drawer. We submit that it was on account of this possibility of variation in the nature of the possession of explosives that Parliament has entrusted to the Attorney-General the duty of examining the circumstances of each case to see what proceedings, if any, are warranted. In the present case, it may be that the Attorney-General thought, as we submit he did think, that there was a prima facie case on the depositions against the appellant in respect of the events which were alleged to have taken place at Derryhealey, and that it was those events which warranted a prosecution under the Act of 1883. The learned chairman, however, only dealt with the question of the possession of explosives for an unlawful object in general terms, and it may be that the jury thought that they were entitled to convict the appellant on the basis of his possession of the revolver and ammunition at his home. That was not the offence in respect of which the Attorney-General had given his consent, and it is settled that proceedings under the Act of 1883 taken without the requisite consent are void: see *R. v. Bates*[1], and also *R. v. Fuidge*[2], a case under the Vexatious Indictments Act.

Bowman for the Crown. The jury had evidence upon which they might properly have convicted the appellant of having had possession of the revolver and ammunition at Derryhealey, for they had before them a statement to that effect which, according to the Crown witnesses, had been made by him, although he later denied it, and there is no doubt that the learned chairman addressed the jury on what he referred to as "this disgraceful matter", that is, the events at Derryhealey.

[CURRAN L.J.: The indictment charged the offence as having been committed in County Fermanagh, and the learned chairman addressed the jury on that charge. If the indictment had specified the place where the offence was alleged to have been committed, as it was specified in the consent, would not the chairman have charged the jury on that basis? The Attorney-General had given his consent in the form of a charge, and one wonders why it was not reproduced in the indictment.]

The Indictments Act refers to laying a charge in the county as being sufficient.

[CURRAN L.J.: The Attorney-General specified precisely the

[1] [1911] 1 K.B. 964.

[2] (1864) 33 L.J. M.C. 74.

charge to which he was consenting, and the indictment should have adhered to the charge which he had specified.]

BLACK L.J. delivering the judgment of the court: In this case Robert George Taylor, the appellant, was charged on indictment at Enniskillen Quarter Sessions on October 6, 1959. The indictment on which he was charged contained three counts. The first two of these concerned an incident on May 25, 1959, which, according to the indictment, took place in the County of Fermanagh, but which in fact, according to the Crown case, occurred in the townland of Derryhealey in that county. The third count alleged an offence of knowingly having possession or control of explosive substances contrary to section 4 of the Explosive Substances Act, 1883, and charged that the prisoner on the same date in the County of Fermanagh had in his possession or control explosive substances, to wit, a revolver and five rounds of ammunition under such circumstances as to give rise to a reasonable suspicion that he did not have the same in his possession or under his control for a lawful object.

The third offence was therefore also charged as having been committed in the County of Fermanagh, but under the provisions of section 7 of the Explosive Substances Act, 1883, before a prosecution can take place for an offence against section 4, the Attorney-General must consent to the institution of the prosecution. The reasons for this provision are probably as indicated by Mr. Jones in argument, but whatever the reasons may be, the Attorney-General of the day is required to direct his mind to the matter, and to decide what prosecution shall be brought. In the present case, the consent of the Attorney-General is dated June 8, 1959, and gives consent to the prosecution of the appellant on indictment on the following charge: "that he on the 25th day of May, 1959, at Derryhealey, Brooke-"borough, in the County of Fermanagh did knowingly have in his "possession or under his control explosive substances, to wit, one .45 "Smith and Wesson revolver and five rounds of ammunition under "such circumstances as to give rise to a reasonable suspicion that he "did not have same in his possession or under his control for a lawful "object, contrary to section 4 of the Explosive Substances Act, 1883." Now it is well established by the cases which were cited in argument that in cases where the consent of the Attorney-General to a prosecution is required, that consent is a condition precedent to the institution of proceedings, and the court has no jurisdiction to deal with a charge other than one for which the requisite consent has been given, and it is clear that the consent in the present case is a consent

to a charge of having a revolver and ammunition at Derryhealey.

The case came on for hearing, and the prisoner was tried on the indictment containing the three counts. As to the first and second counts, the jury disagreed, but in regard to the third, they had before them two pieces of evidence. One of these was a statement alleged to have been made by the prisoner, and, if the contents of that statement were true, it would undoubtedly constitute an admission by the prisoner that he had had the revolver and ammunition in his possession at Derryhealey, but at the trial both the accuracy and the admissibility of that statement were challenged, and the prisoner in evidence denied the statement. The other piece of evidence was that the revolver and ammunition were found in the possession of the prisoner, not, however, at Derryhealey, but at his home, which was some four miles away.

As I have already stated, the only jurisdiction to prosecute the prisoner for this offence was to prosecute him in respect of his possession of the revolver and ammunition at Derryhealey, and why it was thought fit to draw the indictment in a wider form I do not know, for one would have thought that it would have followed the terms of the Attorney-General's direction. The case, however, proceeded on the basis of the indictment. The learned chairman of quarter sessions, in his summing-up to the jury dealt generally with the question of the possession of the revolver, and whether the possession of it by the prisoner might have been for a lawful object or not, and his remarks might well have been taken by the jury to mean that the question which they had to determine was whether at any time the prisoner's possession of the revolver was for a lawful object, so that they may have thought that they were entitled to find the prisoner guilty if they reached the conclusion that the possession by the prisoner of the revolver at his own home was not for a lawful object. That, however, was not what the Attorney-General had directed that the prisoner should be prosecuted for, since his consent related to a charge of possession of the revolver at Derryhealey, and we are accordingly satisfied that the direction to the jury, instead of leaving the question generally as to the possession of the revolver, should have focussed the attention of the jury on possession of it at Derryhealey.

It may well be, therefore that the jury thought they could convict the prisoner on the basis of his possession of the revolver generally, and that they may have found him guilty because they thought that his possession of it at his home was not for a lawful object. Accordingly since the jury may not have addressed their minds to the charge

which was authorised by the Attorney-General, the conviction cannot stand, and must be quashed.

Appeal allowed.

Conviction quashed.

Solicitor for the appellant: *F. G. Patterson.*

Solicitor for the Crown: *E. C. Ferguson.*

J.P.

MAGEEAN AND OTHERS v. COMMISSIONER OF VALUATION[1]

Valuation—Rating—Exemption—"Church hall, chapel hall or similar building"—Building used by university students of a particular religious denomination for recreational and social purposes—Whether entitled to exemption—Rating and Valuation (Amendment) Act (Northern Ireland), 1956 (c. 23), s. 1.

Section 1(1) of the Rating and Valuation (Amendment) Act (Northern Ireland), 1956, provides that the Commissioner of Valuation shall distinguish as exempt any hereditament consisting of "a church hall, chapel hall or "similar building held by a religious body, so long as that hall or building "is used mainly or exclusively for purposes connected with that body."

The appellants were the trustees of a fund known as "The Catholic Men's "Hostel (Q.U.B.) Fund" and were the occupiers of a hereditament situate close to Queen's University, Belfast, and known as "the Catholic Chap- "laincy." The hereditament comprised an assembly room, lecture and committee rooms, a library and a canteen, and there was also certain residential accommodation occupied by the Roman Catholic Dean of Residences at the University. The Chaplaincy was open daily and was used for social and recreational purposes by Roman Catholic graduates and undergraduates of the University, and meetings of certain Roman Catholic religious societies connected with the University were held there. The building also contained a chapel and sacristy in which religious services were held regularly on weekdays but not on Sundays. The chapel and sacristy had been distinguished as exempt in the valuation lists, but the appellants contended that the remainder of the building was also entitled to exemption. On appeal from the Commissioner, the Recorder of Belfast held that although certain activities of a religious character took place in the hereditament the main purpose for which it was used was as a kind of social club with a religious atmosphere and therefore that the user thereof was not similar to that of a church hall or chapel hall so as to attract exemption under the Act of 1956.

Held, by the Court of Appeal (Curran L.J. dissenting), that the hereditament was a "church hall, chapel hall or similar building" and accordingly entitled to exemption.

Per Lord MacDermott L.C.J.: To constitute a "church hall, chapel hall or "similar building" the building in question must be used to further the work or meet the needs of a group or community of worshippers, which group or community may be a congregation or a more loosely knit body such as members of a university or a garrison having a common religious faith. If a building is so used, it is immaterial that the activities carried on in it are merely ancillary to the advancement of religion.

Per Black L.J.: A hereditament will not necessarily cease to be a "church "hall" within the meaning of section 1(1) of the Act of 1956 merely because in addition to being used for religious meetings it is also used for social and recreational purposes designed to further the work of the religious body by

[1] In the Court of Appeal before Lord MacDermott L.C.J., Black and Curran L.JJ.: Sept. 23, 24, 29, 1959; Feb. 12, 1960.

which it is held. The main conception in the phrase "similar building" in that section is that of a building used by a religious body in a manner in which a church hall or chapel hall would be used and serving purposes which a church hall or chapel hall would serve; whether a building is a "similar "building" in that sense is a question of fact, but the evidence in the present case is such as to justify the court in reaching a conclusion different from that reached below.

Per Curran L.J.: A "similar building," to come within section 1(1) of the Act of 1956, must be ancillary to a place of worship, and unless it is so, the question as to its user does not arise.

CASE STATED by the Recorder of Belfast.

The appellants were the trustees of a fund known as "The Catholic "Men's Hostel (Q.U.B.) Fund" which, by the terms of its trust deed, was held "upon charitable trusts for the religious and educational "welfare of Roman Catholic students and graduates of the Queen's "University of Belfast...." and whose "primary objects" were "(a) the provision and maintenance of a Hostel for Roman Catholic "men students and graduates of the Queen's University of Belfast.... "whereby and in which the religious and educational needs of the "said students and graduates shall be provided for." and "(b) the "provision and maintenance of a Roman Catholic University Church "for use in conjunction with said University." Under these trusts the appellants held certain premises situate at Fitzwilliam Street, Belfast, close to the main buildings of the Univeristy. The premises, known as the Catholic Chaplaincy, had originally consisted of four dwelling-houses, but had been converted into one structure comprising a chapel and sacristy, an assembly room, lecture and committee rooms, a library, a canteen and certain dwelling accommodation occupied by the Roman Catholic Dean of Residences at the University. The chapel and sacristy had been treated as a separate hereditament and distinguished as "exempt" in the Valuation lists by the Commissioner of Valuation, and the subject of this appeal was the hereditament comprising the remainder of the Chaplaincy, which the Commissioner had refused to treat as wholly or partially exempt from rating.

The following facts were found in the case stated:—

The chapel used in connection with the hereditament was open for use to all members of the staff of the University, all graduates and undergraduates both for organised services and private devotions; services were conducted in the chapel regularly on week days, but not on Sundays, and devotional meetings were held on certain evenings

each week; the hereditament itself was open to the same persons as the chapel, and was open daily; the Dean of Residences, appointed by the University on the nomination of the Roman Catholic Bishop of the Diocese of Down and Connor to look after the moral and spiritual welfare of the Roman Catholic undergraduates and graduates attending the University, resided on the premises so as to be accessible to the students; the library contained books on Roman Catholic subjects and Roman Catholic views on both secular and religious subjects, daily and weekly Roman Catholic papers and periodicals of interest to Roman Catholics; the canteen was open daily for the sale of tea, biscuits, ice-cream and cigarettes, but its takings were small, the premises being maintained mainly by private voluntary subscriptions; the activities carried on in the premises included religious meetings, and meetings of various Roman Catholic societies connected with the University.

In a reserved judgment, the Recorder upheld the decision of the Commissioner, but stated this case for the opinion of the Court of Appeal on the following questions:—

Whether he had been right in law in deciding (i) that the hereditament did not fall within the meaning of a "church hall, chapel hall or "similar building" within the meaning of section 1 of the Rating and Valuation (Amendment) Act (Northern Ireland), 1956; (ii) that the hereditament was not used exclusively for charitable purposes within the meaning of section 63 of the Poor Relief (Ireland) Act, 1838; (iii) that the hereditament was not used exclusively or mainly for charitable purposes within the meaning of section 2 of the Rating and Valuation (Amendment) Act (Northern Ireland), 1956.

At the hearing of the appeal, it was agreed that if the appellants succeeded in claiming exemption on the ground that the hereditament came within the provisions of section 1 of the Act of 1956, the questions raised in the case stated respecting the other grounds of exemption need not be pursued, and this report relates only to the issues raised by the first question in the case stated.

Conaghan Q.C. and *Kennedy* for the appellants. In approaching the Act of 1956 one is entitled to have regard to the state of the law when the Act was passed: see per Lord Denning in *Escoigne Properties Ltd. v. Inland Revenue Commissioners*[1]. When this Act was passed, the position was that there was some doubt as to the position of church halls because of the fact that certain non-charitable activities were carried on therein, and the object of the Act was to

[1] [1958] A.C. 549, 565.

improve their position as regards rating; one is also entitled to have regard to the corresponding English legislation, the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 7, and to the differences between those provisions and the Act of 1956. All that the court can do is to take judicial notice of the previous state of the law and of other matters generally known to well-informed persons[1].

The learned Recorder held that the hereditament was not entitled to exemption because the user of the premises was more like that of a club than a church hall, and we submit that in doing so he was wrong in law. In the first place, he erred in his approach to section 1 of the Act, and his application of it to the facts of this case. The section provides that a church hall, chapel hall or similar building held by a religious body is to be wholly exempt from rating if it is used exclusively or mainly for purposes connected with that body; and, by section 1(2), it is provided that a building partly so used is entitled to partial exemption; but the Recorder seems to have assumed that this hereditament would be entitled to exemption if, and only if, its main user was similar to that of a church hall. There was clear evidence that the hereditament was used for purposes connected with the religious body, and we submit that on the facts found, the hereditament was entitled to exemption, whether total or partial, and that there was no evidence to support the conclusion that it was not entitled to any exemption.

[BLACK L.J.: Is it your contention that the correct approach to the question is from the point of view of user?]

We would submit that it is.

[CURRAN L.J.: There was no evidence as to the user of church halls.]

The Recorder finds that the organisations using the hereditament were similar to those found in most Roman Catholic parishes. In any event, the remarks of Lord Denning as to judicial notice are very much in point.

[CURRAN L.J.: The section refers to "church hall, chapel hall or "similar building." Does that not presuppose a connection with a place of worship?]

[LORD MACDERMOTT L.C.J.: The Northern Ireland Act does not contain the expression "used in connection with a place of public "worship" which appears in the English Act.]

1 [1958] A.C. at 566.

[BLACK L.J.: In any event the appellants would say that in this case there is a chapel. Do you place any reliance on this?]

Yes, the trust deed provided for the establishment of a University Church as well as the hostel, and that was not an ancillary object. The church and the hereditament constitute a church and a church hall, but we would submit that in view of the difference between the Act of 1956 and the English Act, the hereditament would be entitled to exemption even if the church were not there.

The decisions under the English Act support the claim for exemption: see *Church of Christ Scientist v. Westminster Corporation*[1], *Springfield Synagogue v. Gladwin*[2]; *West London Methodist Mission v. Holborn Borough Council*[3].

While we say that there was no evidence to support the conclusion that the appellants are not entitled to any exemption, we submit that the case is much stronger; the evidence, both of the accommodation provided and of the activities carried on are indicative of user similar to that of a church hall. It is to be remembered that the Legislature has distinguished between churches and church halls; the former are used for worship, and the latter must accordingly be used for other purposes, and see per Brown J. in *Commissioner of Valuation v. Trustees of Fisherwick Presbyterian Church*[4]. Accordingly, we submit that the Recorder was wrong to hold that because the hereditament was used for club purposes it was not entitled to exemption. There was nothing in the activities carried on to exclude the claim for exemption; the canteen is merely provided as a matter of comfort and convenience, and it is ancillary to the main user of the premises. As to the accommodation for the Dean of Residences, it was provided to enable him to carry out his duties, and we submit that it would not be strange to find in a church hall some accommodation such as an office or other room for the use of the minister.

We would also submit that, on the primary facts found, as opposed to inference from those facts, it was wrong to conclude that the hereditament was mainly used for club purposes.

Lowry Q.C. and *Rowland* for the Commissioner. Under the Valuation Code, the onus is on those claiming the benefit of an exemption provision to establish their claim: see *Clancy v. Commissioner of Valuation*[5]. The question in issue before the Recorder was one of fact and degree, and his findings cannot be disturbed

1 (1958) 3 Ryde's Rating Cases 35.
2 (1957) 2 Ryde's Rating Cases 338.
3 (1958) 3 Ryde's Rating Cases 86.
4 [1927] N.I. 76, 81.
5 [1911] 2 I.R. 173, 184.

unless the appellants can show that the Recorder misdirected himself as to the meaning of the section, or that he made a wrong approach in principle by taking into account matters which he should not, or by failing to regard matters which he should have taken into account, and we submit that they have not done so. It is a matter of opinion to say whether a building is similar to a church hall, and the appellants would have to show that the evidence was such that the Recorder could not fail to find in their favour, or that he applied the wrong test, which is a question of law. There is no real test as to what would constitute a similar building, but purpose and user must be the dominant factors, and those are the factors to which the Recorder directed his attention; on the evidence, we say, the Recorder's conclusion was not only a tenable one, but was the right one, though we need not go so far.

It is to be observed that the section grants exemption to a "church "hall, chapel hall or similar building"; it was not the intention of the Legislature to exempt any building held by a religious body, or any building used for the advancement of religion, but only to buildings which are similar to church halls. In order to ascertain what the Legislature intended, one must take into account matters generally known to well informed persons (per Lord Denning in *Escoigne Properties Ltd. v. Inland Revenue Commissioners*[1]), and we say that a well informed person would understand the term "church hall" as referring to a hall associated with a place of religious worship. The reason for the omission of the words found in the corresponding English Act is that in Northern Ireland, some halls are themselves used for public worship, but we submit that in order to come within the section, the building must be ancillary to a place of worship, or be that place. In the present case, although there is a chapel, there is no finding of fact that the hereditament is ancillary to the chapel, and such reference as there is to the matter suggests the contrary, for the case stated speaks of "the chapel used in connection with the "hereditament." There are no services on Sundays, and those who used the hereditament attended other places of worship on Sunday. Regarding the activities carried on in this hereditament, it is not sufficient to say, as the appellants have said, that they are not inconsistent with those of a church hall, but we would submit further that the user of the hereditament is not similar to that of a church hall. One does not expect to find a residential flat in a church hall, except perhaps for a caretaker, and although one might expect

1 [1958] A.C. 549, 566.

catering facilities, the canteen in this case is open daily, and one would not ordinarily find a church hall open generally for unorganised activities as these premises are. The Recorder has held that the hereditament is not a "church hall, chapel hall or similar "building" within the meaning of section 1 of the Act of 1956, and accordingly no question of partial exemption under section 1(2) can arise. [They also referred to *Bailey v. Potteries Electric Traction Co.*[1] *Gilbert v. Hickinbottom & Sons Ltd.*[2], *Commissioner of Valuation v. McAllister*[3], *Hudson's Bay Co. v. Thompson*[4].]

Conaghan Q.C. replied.

Cur. adv. vult.

LORD MACDERMOTT L.C.J.: This valuation appeal, which comes before us on a case stated by the learned Recorder of Belfast, relates to a hereditament held by the appellants as the trustees appointed by a deed of trust dated August 20, 1948, which established a fund called "The Catholic Men's Hostel (Q.U.B.) Fund." It will be convenient to note at once the following provisions of this deed. It says that the trustees thereof "shall hold the trust funds and the "income thereof upon charitable trusts for the religious and educational welfare of Roman Catholic students and graduates of the "Queen's University of Belfast or affiliated or associated Colleges and "the following provisions of this deed shall take effect subject to and "only as far as consistent with such primary charitable trust." That is clause 3. Clause 4 describes the "primary objects" of the fund in two paragraphs which read thus: "(a) the provisions and maintenance of "a Hostel for Roman Catholic men students and graduates of the "Queen's University of Belfast or affiliated or associated Colleges "whereby and in which the religious and educational needs of the "said students and graduates shall be provided for," and "(b) the "provision and maintenance of a Roman Catholic University Church "for use in conjunction with said University."

I need not refer to the powers conferred by this trust deed. It is clear that the hereditament was acquired by the appellants for the purposes of, and is subject to, this trust. It is also clear that the trustees under the deed are representatives of the Roman Catholic Church, and in this connection it may be observed that by clause 7 the power to appoint new trustees is vested in the Roman Catholic

1 [1931] 1 K.B. 385, 481.
2 [1956] 2 Q.B. 40, 50-1.
3 [1954] N.I. 54, 64.
4 [1959] 3 W.L.R. 317.

Bishop for the time being of the Diocese of Down and Connor, who may, if he so chooses, appoint himself as a trustee.

The hereditament consists of Nos. 14, 16, 18 and 20 Fitzwilliam Street, Belfast, save and except that portion thereof which is set aside and used as a chapel and sacristy. This chapel and sacristy have been marked as exempt from rating by the Commissioner of Valuation, and the appellants claim in this appeal that this exemption should be extended to the remainder of the premises, which constitutes the hereditament in question. Fitzwilliam Street is in the immediate neighbourhood of the main buildings of the University, and though the house numbers I have mentioned once indicated separate terrace dwellings it is clear from the evidence that these have now been reconstructed internally so as to form one structure, with the house numbers indicating only the original frontages.

Together with the chapel and sacristy, which I have mentioned, the hereditament is known as "the Catholic Chaplaincy." It provides accommodation for Father Kelly, who is the Roman Catholic Dean of Residences of the University, and for the work which he has been appointed to perform in that capacity and which is generally described in the case stated as being "to look after.... the moral and spiritual "welfare of the Roman Catholic undergraduates and graduates attending the University."

The work of the Catholic Chaplaincy is carried on on the three floors of the hereditament. On the ground floor there is a lounge, assembly room, lecture room, committee room, canteen, kitchen, store rooms and toilet facilities. On the first floor there is the chapel and sacristy, two connecting rooms used as a library, more committee or meeting rooms, an office and further storage and toilet facilities. The attic floor contains the living quarters of Father Kelly with two guest rooms, a staff bedroom and toilet facilities. The chapel is used in connection with the hereditament and is open to all members of the staff of the University and all graduates and undergraduates for organised services and for private devotions. Sodality meetings, that is to say, meetings of groups organised to carry out a joint and regular devotion are held in the chapel on four evenings a week. The library contains books on Roman Catholic subjects and Roman Catholic views on both secular and religious subjects together with Roman Catholic journals and periodicals. The canteen is provided for the sale of such things as tea, biscuits, ice-cream and cigarettes. It encourages students to use the premises, but the takings are small and the hereditament is maintained mainly by private voluntary

subscriptions. Various Roman Catholic religious societies connected with the University also use the hereditament for meetings. Father Kelly is expected to reside in the accommodation provided for him on the attic floor, and the Recorder finds that "it is important for him to "be accessible there to guide and advise students."

The general nature of the user of the premises may be inferred from what I have just said. It is described in the judgment of the Recorder in a passage which refers to the hereditament as the "hostel" and read thus: "There is no doubt that the hostel is used to advance "religion. In this connection religious books and papers are provided; "meetings of various religious societies are held from time to time, "and Father Kelly is at hand to guide and advise the students and "graduates. Bearing these facts in mind, I am nevertheless of opinion "that these activities do not represent the main part of the user of the "hostel. It seems to me that the main use to which the hostel is put is "as a kind of club. There the students and graduates meet in social "intercourse; there is a canteen in which they can buy a cup of tea, "biscuits, ices and cigarettes; they can smoke, read the newspapers "and relax. These are facilities that one associates with a club, and "in my opinion the hostel is used mainly for these club purposes, its "users for the advancement of religion being subsidiary to its user for "such purposes."

The appellants sought exemption on several grounds, one of which was that the hereditament came within the provisions of section 1(1) of the Rating and Valuation (Amendment) Act (Northern Ireland), 1956. It was agreed that if the appellants succeeded on this ground the questions raised in the case stated respecting the other grounds need not be pursued on this appeal. Section 1(1) of the Act of 1956 is in these terms: "In preparing any valuation lists the Commissioner of "Valuation shall distinguish as exempt under section two of the "Valuation (Ireland) Act, 1854, any hereditament or part of a "hereditament consisting of a church hall, chapel hall or similar "building belonging to or held by a religious body, so long as that "hall or building is used mainly or exclusively for purposes connected "with that body, and, as from the first day of April, nineteen hundred " and fifty-seven, the said section two shall have effect accordingly."

Subsection (2) of the same section provides that where premises of the kind referred to in subsection (1) are not used mainly or exclusively for the purposes referred to in that subsection, the valuation is to be estimated by reference to the extent to which the

premises are used for purposes other than those purposes. And subsection (3) enacts that the use for profit of premises of the kind referred to in subsection (1) (whether by way of letting or otherwise) is not to be regarded as a use for purposes connected with a religious body.

It was conceded that the hereditament held by the appellants was held by a religious body within the meaning of subsection (1), and that it was used mainly or exclusively for purposes connected with such body. In these circumstances the question in debate under subsection (1) was whether the hereditament was "a church hall, "chapel hall or similar building." The Recorder, in a considered judgment, held that it was not, and on this and other grounds, which are not presently material, he dismissed the appellants' appeal.

The reasons for this decision are indicated, to some extent, in the passage from the judgment to which I have already referred, particularly in that part thereof which expresses the opinion that the user of the hereditament for the advancement of religion is subsidiary to its user for the purposes of a club. Two later passages expose the ratio more fully. The first reads as follows: "It is clear that it is "always a question of fact and degree in every case whether the user "of a building is such that it answers the description of a building of "the kind referred to in section 1(1) of the Act of 1956. If, therefore, "the main user of the hostel in the present case is similar to that of a "church hall the hostel will clearly be entitled to relief from rating in "accordance with the provisions of section 1(1) of the Act of 1956." The second comes after the reference to the "activities of a religious "character" which take place in the hereditament. The Recorder then proceeds: "Let us look at the other uses to which the hostel is put. "We find that the hostel is open daily, that it has a canteen also open "daily in which can be bought certain refreshments and cigarettes, "that it provides newspapers, that it contains a flat, two guest rooms, "two staff bedrooms and a garage. One would not, I think, expect to "find these amenities or residential accommodation in a church hall "or similar building. My reference to these matters is, of course, not "by way of criticism. I have no doubt the provision of these facilities "is of great value and serves a laudable purpose, but it seems to me "that these facilities and accommodation are rather of the type to be "found in a club than in a church hall or similar building, and I am "satisfied that the object for which the hostel was established, and "for which it is used, was and is to provide a kind of social club with "a religious atmosphere which would attract and interest the Roman "Catholic students and graduates of the University."

These excerpts seem to me to indicate that the learned Recorder reached his decision on the basis of two conclusions. In the first place, he obviously took the view that, in considering whether a hereditament was a "similar building," the criterion of similarity was one of user and not simply a matter of structural or architectural similarity. In my opinion this is the right view. If it could be said that church halls or chapel halls possessed some common, distinguishing physical feature, I would be inclined to think differently, as the expression is "similar building" and not "building similarly used." There is, however, no customary or prevailing physical feature to mark out the church hall or the chapel hall and thus form a ground for comparison. This was not disputed before us and I can see no other test of similarity which does not include user. This view finds support in *West London Methodist Mission v. Holborn Borough Council*[1], a decision of an English Divisional Court on section 7(2)(b) of the English Rating and Valuation (Miscellaneous Provisions) Act, 1955. That enactment is by no means identical with section 1(1) of the Northern Ireland Act of 1956, but the words "church hall, "chapel hall or similar building" occur in both, and the court in the case cited refused to apply a structural criterion, Lord Goddard saying of the building in question[2]: "Architecturally, I dare say, it is not "what one thinks of as a church hall, but I am quite certain that this "section is not to be tested by some architectural test."

Where a test of user leads bring me to the learned Recorder's second conclusion. This was, in effect, that a building would not be a "similar building" unless it was used mainly for purposes which, in themselves, were for the advancement of religion. The reasoning here is clear. A church or chapel hall is, in the Recorder's view, a place used mainly for such purposes, and the user of a "similar building" has to be of the same character. The main user of the hereditament was, the Recorder held, that of a social club, a user ancillary, no doubt, to the religious purposes for which the hereditament was held, but not the sort of user which he regarded as typical of church or chapel halls.

The issue which thus emerges is, therefore, whether the church and chapel halls of section 1(1) of the Act of 1956 are places used mainly for purposes which are in themselves, for the advancement of religion. That such halls may be so used goes without saying; but what of halls which are not so used? Can they be regarded as church or chapel halls within the meaning of the subsection?

[1] (1958) 3 Ryde's Rating Cases 86. [2] Ibid. 91.

The draftsman of this subsection plainly had before him section 7(2) of the English Act of 1955, to which I have already referred, for that subsection provides for rating relief not only in respect of certain places of public religious worship, but also for "any church "hall, chapel hall or similar building used in connection with any "such place of public religious worship, and so used for the purposes "of the organisation responsible for the conduct of public religious "worship in that place....."

As I have observed, the phrase "any church hall, chapel hall or "similar building" is common to both the English and Northern enactments, but, that apart, their similarity is not very close. I doubt even if the word "chapel" can be construed in the same way in both jurisdictions. The English enactment, however, does make one matter clear. Its requirement that the halls to which it refers must be used in connection with a place of public worship finds no echo in the Northern Ireland statute. That provision has been deliberately omitted, and a hereditament may be within section 1(1) of our Act of 1956 even though it is not used in connection with any separate place of public worship. This departure from the English statute is understandable for, in this country, particularly in newly settled districts, it is not uncommon to find buildings which everyone would describe as church halls in use as places of public worship though they accommodate as well the other activities of the body or congregation of worshippers using them.

What, then, is the badge of the kind of hall to which section 1(1) refers if it is not its connection with a separate place of public worship? In my opinion a hall to be within the meaning of that subsection must be a hall used to further the work or meet the needs of a group or community of worshippers associated for the purposes of their religion. It is not enough that the hall should be a hall held by a religious body. The words "church" and "chapel" are not surplusage or meaningless. To my mind they point to worship and an association of worshippers, be that association a congregation in the ordinary sense or some more loosely knit body such, for example, as the members of a particular university or garrison who have a common bond in their religious beliefs and observances.

But it does not by any means follow from this that the halls mentioned in the subsection must, to remain within it, be places used mainly or at all for activities of a purely religious character. The activities of an organised body of worshippers are now seldom confined to acts of worship or religious teaching. It is common

knowledge that many such bodies recognise a need to provide instructional and recreational facilities for their young people and a place where their members can meet socially. Such activities are not, in themselves, observances of a religious character, but they are organised or arranged for the benefit of those who participate in them and so that they may do so in the atmosphere and under the influence of the religious community to which they have attached themselves. These activities may take many forms. For example, they may include literary circles, debating societies, physical training classes, clubs for young people, or the work of recognised organisations such as the Girl Guides, the Boy Scouts, or the Boy's Brigade. Such activities tend to support and strengthen indirectly the religious purposes of the community which fosters them and they are entered upon on that account and as ancillary to the advancement of religion.

In my opinion a church or chapel hall is within section 1(1) of the Act of 1956 even though its user is confined to these ancillary activities. This, I think, is where the learned Recorder erred. As I read his judgment he took the view that the main user of such halls had to be of a purely religious character—for the advancement of religion. I think the intention behind section 1 of this Act was to recognise that the activities of an organised religious community of worshippers do not end with purely religious observances, and that church halls and like buildings are often used for ancillary activities such as I have described, which, on their merits, ought also to have some form of rating relief.

In the present case the hereditament, and the chapel and sacristy, are used to meet the religious needs of an association of worshippers —the Roman Catholic students of the University—and, for the reasons I have mentioned, I hold it immaterial that the activities catered for by the hereditament are but ancillary to the advancement of religion. There would, in my view, be no answer to the appellants' claim if the chapel and sacristy had been a separate building, with the hereditament standing in its vicinity and fulfilling its present functions. It would then be used by the community for which it is provided in much the same way as the ordinary church hall is used to serve the congregation which provides it. I cannot see that the fact that the Roman Catholic Dean of Residences resides in the hereditament makes any difference of significance. His presence there is to facilitate the work of the Catholic Chaplaincy, and the accommodation which he occupies cannot, on any reasonable view, be severed from the rest of the hereditament for rating purposes.

I would therefore allow the appeal and answer the first question submitted by the learned Recorder in the negative.

BLACK L.J.: By section 1(1) of the Rating and Valuation (Amendment) Act (Northern Ireland), 1956, (to which I shall refer as "the "Act of 1956") it is enacted that in preparing any valuation lists the Commissioner of Valuation shall distinguish as exempt under section 2 of the Valuation (Ireland) Act, 1854, any hereditament or part of a hereditament consisting of a church hall, chapel hall or similar building, belonging to or held by a religious body so long as that hall or building is used mainly or exclusively for purposes connected with that body.

The first question posed in the case stated by the learned Recorder is whether he was right in law in deciding that the hereditament which was the subject of the appeal did not fall within the meaning of a "church hall, chapel hall or similar building" within the meaning of section 1 of the Act of 1956.

The wording of section 1(1) of the Act of 1956 is obviously drawn, but with significant variations, from that of section 7(2) of the English Rating and Valuation (Miscellaneous Provisions) Act, 1955. Section 7(1) of that Act provides for relief from rates of hereditaments to which the section applies. And section 7(2) enacts that the section is to apply to (a) places of public religious worship which belong to the Church of England or to the Church in Wales.... or which are for the time being certified as required by law as places of religious worship, and (b) any church hall, chapel hall or similar building used in connection with any such place of public religious worship, and so used for the purposes of the organisation responsible for the conduct of public religious worship in that place.

In view of the concluding proviso to section 63 of the Poor Relief (Ireland) Act, 1838, which directed that no church, chapel or other building exclusively dedicated to religious worship should be rateable, it was presumably considered not to be necessary to insert in the Act of 1956 a provision such as that found under heading (a) in section 7(2) of the English Act of 1955. And when we come to compare section 1(1) of the Act of 1956 with heading (b) in section 7(2) of the Act of 1955 we find that the exemption conferred by section 1(1) of the Northern Ireland Act is more widely expressed than the exemption conferred under heading (b) of section 7(2) of the English Act. While in order to be entitled to relief from rating under heading (b) in the English Act a building must be used in connection with a place of

public religious worship entitled to relief under heading (a), the Northern Ireland Act of 1956 does not in terms require that in order to enjoy exemption from rating a church hall, chapel hall or similar building must be used in connection with a specific place of public religious worship, but confers exemption on any church hall, chapel hall or similar building belonging to or held by a religious body so long as it is used mainly or exclusively for purposes connected with that body. If it were not for the fact that the wording of section 7(2)(b) of the English Act of 1955 limits the relief from rating to a church hall, chapel hall or similar building only when it is used in connection with a place of public religious worship, I do not think it would have occurred to one to contend that the wording of section 1(1) of the Northern Ireland Act of 1956 limited the relief to church halls, chapel halls or similar buildings only if and when they are used in connection with specific places of public worship. It is not unfamiliar in Northern Ireland to find halls bearing all the indicia of church halls and belonging to a particular religious denomination yet not attached to or used in connection with a particular church or other place of worship. Many of such halls would be referred to in ordinary parlance as church halls. And even if the phrase church halls in section 1(1) of the Act of 1956 is to be construed, as it would apparently have to be construed under the English Act, as a hall used in connection with some particular church, yet it seems to me that the phrase "or "similar building belonging to or held by a religious body" in the same subsection of the Act of 1956 is clearly wide enough to cover any building belonging to or held by a religious body and possessing the same characteristics as a church hall even though it is not used in connection with some particular place of worship.

What then is meant by a church hall, chapel hall or similar building? The Act of 1956 does not give us any definition of these phrases and accordingly, to adopt a dictum of Lord Denning's to which we were referred during the argument, all that the court can do is to take judicial notice of matters generally known to well informed people. By the phrase "church hall" I think the ordinary well informed citizen of Northern Ireland would visualize a building usually but not necessarily connected with a particular parish or congregation and used for the carrying on in connection with and under the superintendence and control of a religious body a variety of activities of a religious or quasi-religious nature, but also perhaps used for providing in a suitable environment social and recreational facilities for the purpose of keeping together the members of that religious

body in the parish, congregation or district. Such a hall would be used for Sunday schools, Bible classes, choir practices, missionary meetings and meetings of such organisations as the Boys' Brigade or the Girls' Auxiliary. If connected with a particular parish or congregation it might be used for mid-week religious services: if not so connected it would probably be used for holding Sunday services as well. It would also be used for business meetings in connection with the denomination to which it belonged; for vestry meetings, for example, if it were a Church of Ireland hall, for meetings of committee if it were a Presbyterian hall, and it might be used too for meetings of charitable organisations in which the particular denomination to which the hall belonged was interested. A good example of this last mentioned type of organization is the St. Vincent de Paul Society which held meetings in the hereditament with which this appeal is concerned. The hall might also on occasions, depending of course on the views of those in control, be used for purposes of an even more secular colouring, e.g. for holding concerts or sales of work to raise funds for church objects or for charitable objects deemed worthy of support. Moreover I think the ordinary citizen would consider that a still wider range of activities might normally and legitimately be found to be exercised in a church hall. In the *Commissioner of Valuation v. Trustees of Fisherwick Presbyterian Church*[1], the King's Bench Division held that the use of a church hall two or three times a week for playing badminton by members of a guild of young people connected with the church did not deprive the hall of the exemption from assessment to rates conferred by section 2 of the Valuation (Ireland) Amendment Act, 1854, upon hereditaments used for charitable purposes. I am aware that the correctness of the actual decision in that case under the law as it then stood has sometimes been questioned. The importance of the case, however, for our present purpose is that in a case decided in our jurisdiction over thirty years ago both members of the court were clearly of opinion that the provision of recreational facilities for the younger members of a congregation was a legitimate use of a church hall. Brown J. says[2]: "The objection taken by the Commissioners of Valuation is "that the user of this church hall for the playing of badminton is not "for the advancement of religion. Now there can be no doubt that the "whole conception of the nature of religious work has changed in the "last fifty years. Until recent years the organisation of church guilds "was never thought of, but ideas have changed. It is no longer thought "that religious work is sufficiently provided for by church services.

[1] [1927] N.I. 76. [2] Ibid. 81.

"It is generally admitted that a church is crippled without a hall, and "most churches now have a hall in which church work other than "religious services can be carried on. Most churches have a guild with "the object of getting and keeping the young people together, interest- "ing them in the work of the church and tying them, as it were, un- "officially to it. At the guild meetings the minister of a congregation "is enabled to meet the young people, get to know them and they him "as could not be possible if the guild or some similar organisation did "not exist." And Moore L.C.J. says[1]: "This form of recreation is all "devised as part of the organisation of the guild to attract the young "people of the congregation and bring them together, and the guild "is itself part of the church organisation to strengthen and further "the purposes of the church." Accordingly, I am of opinion that a hereditament will not necessarily cease to be a church hall within the meaning of that phrase as used in section 1(1) of the Act of 1956 merely because in addition to being used for religious meetings it is also used for social and recreational purposes designed to further the work of the religious body by which it is held and to hold together the members and adherents of that body.

As regard the physical nature of a building designed to serve as a church hall I should think that originally such a building would probably have consisted mainly of an assembly hall with comparatively little ancillary accommodation. But as the range of activities ordinarily pursued in church halls has extended and developed throughout the years so the accommodation has steadily become more elaborate. Nowadays a well appointed church hall will almost certainly include a number of classrooms, a committee room, a library, a room or rooms set apart for youth organizations such as Boy Scouts and very frequently an up to date kitchen so that the assembly hall tends to an extent to lose its importance as the one dominating feature of the building.

So far I have considered the phrase "church hall" in section 1(1) of the Act of 1956. But the subsection confers the exemption from rates not only upon a hereditament consisting of a church hall or a chapel hall but a hereditament consisting of a similar building belonging to or held by a religious body so long as that hall or building is used mainly or exclusively for purposes connected with that body. The phrase "similar building" is obviously intended to extend the exemption to buildings which would not in ordinary speech be

[1] [1927] N.I. at 80.

spoken of as church halls or chapel halls. In what respect must a building be similar in order to qualify for the exemption? I do not think the subsection can mean similar from the architectural standpoint or at any rate solely from the architectural standpoint. Such a construction would produce results which it would be difficult to attribute to the Legislature. It may indeed be that a similar building might be contemplated as including (among other accommodation) something in the nature of an assembly hall. Whether this is so or not, the lay out of the hereditament with which we are concerned in the present appeal does in fact include an assembly hall. But I think it is tolerably clear that the main conception in the phrase "a similar "building" is that of a building used by a religious body in a manner in which a church hall or chapel hall would be used and serving purposes similar to the purposes which a church hall or chapel hall would serve. This was taken to be the meaning of the phrase by the English Divisional Court in *West London Methodist Mission v. Holborn Borough Council*[1] in which a very wide and liberal interpretation was given by the court to the words "similar building" in section 7(2) of the English Act of 1955 as applied to the facts regarding the building "Wesley House" in that case.

Whether a building is to be regarded in this sense as a similar building to a church hall or chapel hall will depend of course on the facts of the particular case. In some cases the user of the building may be so definitely for religious purposes that there would be no difficulty in saying that its use is similar to that of a church hall or chapel hall. In other cases though the building may be owned by a religious body and though its use is confined to members of that body it may nevertheless be used so predominatingly for social and recreative purposes that its use could not be said to be similar to that of a church hall or chapel hall as those phrases are ordinarily understood. And in many cases the use of the building may be such that the question whether it falls within the class entitled to exemption from rates under section 1(1) of the Act of 1956 is a question of fact and degree upon which this court would not be justified in interfering with the decision of the tribunal which adjudicated on the appeal from the Commissioner of Valuation. The learned Recorder on a survey of the facts of the present case held that the main object of the hereditament was to provide a kind of social club with a religious atmosphere which would attract and interest the Roman Catholic students and graduates of the University and that accordingly the hereditament could

[1] (1958) 3 Ryde's Rating Cases 86.

not be regarded as a similar building to a church hall or chapel hall within the meaning of section 1(1) of the Act of 1956. Notwithstanding the hesitation which one feels in differing from a conclusion of the Recorder, it appears to me that the facts set out in the case stated range the case so definitely on the other side of the line as to justify this court in giving effect to an opposite conclusion. The fact that the Roman Catholic Dean of Residences at the University, whose task is to look after the moral and spiritual welfare of the Roman Catholic undergraduates and graduates attending the University and to guide and advise them on religious matters, resides on the premises and presumably has them under his supervision and control, prima facie indicates that there is a definite religious and indeed denominational atmosphere in the premises. Although the hereditament does not cater for the needs of a particular parish or congregation, as a church hall or chapel hall usually would, and as a church hall or chapel hall would have to do in order to be entitled to exemption from rates under the English Act, yet it caters for the needs of a definite body of persons, namely the Roman Catholic students of the University. The fact that meetings of various Roman Catholic religious societies connected with the University such as the St. Vincent de Paul Society, the Legion of Mary, the Catholic Truth Society and others, are held on the premises constitutes definite user of the premises for religious purposes analogous to the more strictly religious and quasi-religious purposes for which a church hall would normally be used. And the fact that the library is one containing books on Roman Catholic subjects and Roman Catholic views on both secular and religious subjects together with Roman Catholic papers ecclesiastical and lay and periodicals of interest to Roman Catholics indicates that the library is such as one might expect to find in a church hall connected with a religious body which held somewhat strict views as to the class of literature which the libraries in their church halls should appropriately contain. These circumstances as to the user of the hereditament as described in the case stated appear to me greatly to outweigh the matters on which the Recorder has relied in holding that the building was not to be regarded as similar to a church hall. The principal matters on which he relied were the fact that the premises were open daily and contained a canteen in which tea, biscuits, ice-cream and cigarettes could be bought, and that the top floor of the premises was devoted to residential accommodation. Accordingly he concluded that the user of the building resembled a a club rather than a church hall. But I think the Recorder took too

narrow a view of the activities which might normally be pursued in a church hall. The canteen was a small one—its takings in respect of catering for 1956 and 1957 amounted to £67 and £112 respectively. I think that nowadays one would not be over much surprised to find a small canteen in operation at a church hall. With regard to the residential accommodation, this is provided for the Dean of Residences who exercises a supervision and control over the building and whose residence there appears to me to give of itself a religious as opposed to a secular colour to the user of the hereditament. In the *West London Methodist Mission* case[1] to which I have already referred there was to be found in "Wesley House" catering accommodation and residential accommodation on quite an extensive scale. Nevertheless the Divisional Court had no hesitation in holding "Wesley House" to be a similar building to a church hall or chapel hall within the meaning of section 7(2) of the English Act of 1955.

In the result I agree with the Lord Chief Justice that the first question submitted in the case stated should be answered in the negative.

CURRAN L.J.: The appellants contend that the Commissioner of Valuation is required, by section 1 of the Rating and Valuation (Amendment) Act, (Northern Ireland), 1956, to distinguish on any valuation lists the hereditament or part of the hereditament in question as exempt from assessment for rates under section 2 of the Valuation (Ireland) Amendment Act, 1854. The ground on which such contention is based is that the hereditament in question, or a part thereof, is a church hall, chapel hall or similar building, within the meaning of the said section 1 of the 1956 Act.

The Commissioner of Valuation has distinguished another part of the hereditament as exempt. This part consists of a chapel and sacristy. Accordingly three questions have to be answered:— (1) is the remainder of the hereditament or any part thereof a church hall, chapel hall or similar building? If so (2) does it belong to or is it held by a religious body? and (3) it is used mainly or exclusively for purposes connected with that body?

I have set these questions out separately in order to avoid confusion, as in my view the answer to question (1) does not depend upon the answers to question (2) or (3). Neither of those questions arises if question (1) is answered in the negative. What, then, is a "church hall, chapel hall or similar building?" A church or chapel in

[1] (1958) 3 Ryde's Rating Cases 86.

this context is, in my view, a place of worship; and the raison d'être of a church hall or chapel hall is the existence of a church or chapel, in other words, of a place of worship. To put it another way, the church hall or chapel hall is in my opinion ancillary to its church or chapel. Accordingly, in my view a "similar building," to come within the section, must be ancillary to a place of worship.

In the present case there is a chapel or place of worship which is part of the hereditament in question. If it be assumed that the remainder of the hereditament can be said to be similar to a "hall", it is my opinion that it only falls within section 1 of the 1956 Act if it is ancillary to the chapel. I can appreciate that where there is some association between a chapel and the remainder of a hereditament, the chapel may be regarded by the church authorities as an important part of the hereditament. Nevertheless it does not follow that the remainder of the hereditament is ancillary to the chapel. A chapel in a public school is ancillary to the school and not the school to the chapel. In the present case the hereditament is held under a trust deed and the primary objects of the fund with which it was acquired are therein set out as follows: "(a) the provision and maintenance of a "hostel for Roman Catholic men students and graduates of the "Queen's University of Belfast or affiliated or associated Colleges "whereby and in which the religious and educational needs of the "said students and graduates shall be provided for: (b) the provision "and maintenance of a Roman Catholic Univeristy Church for use "in conjunction with said University."

In my view what is being provided falls short of each of these objects, but is on similar lines. If this were not so, I fail to see how it could be justified under the trust deed. If the objects were fully achieved it is difficult to see how the hostel could be regarded as ancillary to the church. It is perhaps significant that the hostel is the first of the primary object set out in the trust deed. But be that as it may, the hostel is a distinct and separate primary object under the trust deed, and there is nothing in the deed to suggest that it is to be ancillary to the church, if any, provided thereunder. In providing the chaplaincy, either the appellants have done what they could towards providing a hostel and a church under the trust deed, in which event my opinion is that the two elements "hostel" and "church" are separate and distinct and not ancillary the one to the other; or, the appellants have done what they could toward providing a hostel, a part of which consists of a chapel, and the chapel is ancillary to the

hostel. In my opinion there is no evidence to support the contention that the chapel is the raison d'être of the amenities provided in the rest of the hereditament.

I would accordingly agree with the decision of the learned Recorder that the part of the hereditament in question is not a "church hall, "chapel hall or similar building" within the meaning of section 1 of the Rating and Valuation (Amendment) Act (Northern Ireland), 1956. I do not agree, however, that the question of user arises in answering this question.

If my opinion is right as to this question, there remain for argument and consideration the other two questions posed in the case stated.

Appeal allowed.

Solicitors for the appellants: *Joseph O'Hara & Son.*

Solicitor for the Commissioner: *G. D. Clarke.*

J.P.

MINISTER OF AGRICULTURE v. ULSTER TRANSPORT AUTHORITY[1]

Agriculture—Importation of livestock—Illegally imported livestock being carried in vehicle from one place in the United Kingdom to another—Whether vehicle liable to forfeiture—Agriculture Act, 1957 (5 & 6 *Eliz.* 2 *c.* 57), *s.* 6—*Imported Livestock Order*, 1958 (*S.I.* 1958, *No.* 558).

Article 7(1) of the Imported Livestock Order, 1958 made under section 6 of the Agriculture Act, 1957, provides that "if any livestock is imported, "removed or brought into the United Kingdom from the Channel Islands, "the Isle of Man or the Republic of Ireland in contravention of the provisions "of this Order, such livestock shall be liable to forfeiture and any vehicle or "container used for the carriage, handling or concealment of such livestock "shall be similarly liable."

Held by the Court of Appeal (i) that the word "removed" in the Act and in the Order refers only to the removal of livestock into the United Kingdom from a place outside it, and not to the removal of livestock from one place in the United Kingdom to another; the process of removal, however, may, in relation to the land boundary, start well on one side of the boundary and end well on the other, and its beginning and end are matters of fact to be determined in the light of the circumstances of each case;

(ii) that the expression "the carriage.... of such livestock" as used in article 7(1) of the Order means the carriage of livestock in the course of a contravention of the Order, and the article does not render liable to forfeiture every vehicle which is used to carry within the United Kingdom livestock which has previously been the subject of a contravention of the Order.

CASE STATED by the Recorder of Belfast.

The Minister of Agriculture for Northern Ireland applied at Belfast Petty Sessions for a forfeiture order under the Imported Livestock Order, 1958, in respect of a motor lorry, the property of the Ulster Transport Authority, on the ground that it had been used for the carriage of livestock imported into the United Kingdom in contravention of that Order. The resident magistrate dismissed the summons, and the Minister appealed. At the hearing before the Recorder of Belfast, the following facts were admitted or proved:

(a) on May 24, 1958, the respondent's lorry was stopped between Moira and Glenavy by Sergeant G. J. Mawhinney, an authorised officer under the Order; the lorry was carrying ten head of cattle, two of which were found to have no punch marks in their ears;

(b) the driver of the lorry was requested by Sergeant Mawhinney to take the lorry to Belfast, and the driver did so;

[1] In the Court of Appeal before Lord MacDermott L.C.J., Black and Curran L.JJ.: Nov. 25, Dec. 18, 1959.

(c) later the same day Sergeant Mawhinney seized the lorry in Belfast, and informed the driver that he was seizing it as it was carrying two head of cattle which he suspected had been illegally imported; he accordingly had reason to suspect that the vehicle had been used for the carriage of livestock imported into the United Kingdom in contravention of the Order; he also seized the two head of cattle; seizure notices were duly displayed;

(d) a forfeiture order respecting the seized cattle was made on September 3, 1958, from which no appeal was taken;

(e) notice of claim on behalf of the respondent was received in the form of a letter dated May 30, 1958.

In a reserved judgment the Recorder held:

(i) that the meaning of the word "removed" in section 6 of the Agriculture Act, 1957, in the context in which it is used in that section was moving livestock from one place to another;

(ii) that if that word had a more limited meaning, there could be no doubt that the lorry was used for the "carriage" of the two head of cattle within the meaning of "carriage" in section 6(3) of the Act of 1957 and Article 7 of the Order of 1958;

(iii) that the provisions of the Imported Livestock Order, 1958, were within the powers granted to the Minister by section 6 of the Act of 1957.

He accordingly allowed the appeal and granted a forfeiture order in respect of the lorry, but stated this case for the opinion of the Supreme Court as to whether he was right in holding as he did. At the hearing before the Court of Appeal, it was conceded that the provisions of the Order were within powers conferred by section 6 of the Act.

Nicholson Q.C., *Harrison Q.C.* and *McIvor* for the appellant.
Lowry Q.C. and *McConnell* for the Minister.

Cur. adv. vult.

LORD MACDERMOTT L.C.J.: This appeal by way of case stated raises an important question as to the construction of article 7(1) of the Imported Livestock Order, 1958.

On May 24 of that year, shortly after the Order had come into operation, one of the defendant's lorries was stopped, while carrying ten head of cattle between Moira and Glenavy, by Sergeant G. J.

Mawhinney of the Royal Ulster Constabulary, who was acting as an authorised officer within the meaning of the Order. Sergeant Mawhinney suspected that two unmarked animals, which he found in the lorry, had been imported into Northern Ireland from the Irish Republic in contravention of the Order, and later the same day he seized these two animals and also the lorry.

The two animals were duly forfeited and it must be assumed that, at some time before the lorry was stopped, they had been illegally imported into Northern Ireland. But there is no finding and nothing in the case stated to suggest that, at the time the lorry was stopped, they were still on the journey which had brought them into Northern Ireland. They were, at that time, being moved from one place in Northern Ireland to another. That is all we know or need to know for the purpose of this appeal as respects the movement which was interrupted in the manner already described. There is nothing to indicate that the defendant, through its servants or agents, was in any way privy to the illegal importation or had knowledge that the animals in question had been illegally imported. The defendant's lorry was seized simply because it had, in fact, been used for the carriage of livestock which had previously been imported contrary to the Order. The learned Recorder of Belfast, on appeal from the resident magistrate, who had dismissed the complainant's summons for forfeiture of the lorry, held that the lorry should be forfeited. The question for this court is whether, on the true construction of the Order, this conclusion was right.

Article 3 of the Order provides, in so far as material, that "No "person.... shall import, remove or bring into the United Kingdom "from the Channel Islands, the Isle of Man or the Republic of "Ireland, any livestock except at one of the ports or by one of the "land routes specified in the First Schedule to this Order and, as "respects those land routes, between such times as are specified in the "said Schedule....."

Article 4 is not directly in point, but is expressed in terms which are of interest, having regard to the question submitted for our decision. It prohibits the unauthorised movement, (a) from a reception lair in Great Britain of livestock "imported, removed or brought into Great "Britain from the Channel Islands, the Isle of Man or the Republic of "Ireland," and (b) from any port or point of entry in Northern Ireland of livestock "imported, removed or brought into Northern

"Ireland", unless in each case such livestock has been examined and marked by or under the supervision of an authorised officer.

Article 5 restricts the movement of any bovine animal from a reception lair if the animal has been "imported or brought into "Great Britain from the Republic of Ireland." It may be noted, for what it is worth, that the word "removed" does not appear in this article.

Article 6 deals with the marking of animals. Article 7 is concerned with the forfeiture of livestock, vehicles or containers and I must quote it fully. It reads: "(1) If any livestock is imported, removed or "brought into the United Kingdom from the Channel Islands, the "Isle of Man or the Republic of Ireland in contravention of the "provisions of this Order, such livestock shall be liable to forfeiture "and any vehicle or container used for the carriage, handling or "concealment of such livestock shall be similarly liable.

"(2) If an authorised officer suspects that any livestock has been "imported, removed or brought into the United Kingdom in con- "travention of the provisions of this Order or that any vehicle or "container has been used for the carriage, handling or concealment "of such livestock, he may seize such livestock and any such vehicle "or container and shall deliver it or cause it to be delivered to an "officer appointed by the appropriate Minister to receive such live- "stock, vehicle or container on his behalf."

Article 8 deals with seizure notices and article 9 provides for the giving of a notice of claim by the owner of what has been seized. If such a notice is given as required by this article forfeiture shall not be effected except by a court order. By paragraph (b) of Article 9(1) the owner of a seized vehicle must claim "that it was at the time of "seizure his property and that it was not used for the carriage, "handling or concealment of livestock imported, removed or brought "into the United Kingdom as aforesaid in contravention of this "Order."

There can, in my opinion, be no doubt that this provision and article 7(2) which, as we have seen, confers the power of seizure, must be read so as to accord with the liability to forfeiture provided for by article 7(1), and the decision under review must, therefore, depend on the meaning of that provision when read in the context of the Order.

The learned Recorder gave two reasons for his determination in favour of the complainant. In the first place he held that the word "removed" in section 6 of the Agriculture Act, 1957, under which the

Order purports to have been made, referred simply to moving livestock from one place to another; and it is clear from his judgment that he regarded the word as having the same meaning in article 7 of the Order. I see no ground for thinking that section 6 of the Act and the Order use the word "removed" in different senses, but I am, with respect, unable to accept the Recorder's reasoning at this point for it is tantamount to saying that "removed" includes all the journeyings in Northern Ireland of an imported animal after it has been imported by sea or across the land boundary. The prohibition contained in article 3 is concerned with livestock removed "into" the United Kingdom "from" certain places outside it. These prepositions cannot be ignored. They are related directly to the word "removed", not only in article 3 but also in articles 4, 7(1) and 9(1) (a); and although the preposition "into" is used in connection with "removed" in some parts of the Order without the preposition "from" as, for example, in article 7(2) and article 9(1) (b), the omission is not in any way significant since the context plainly shows that in each case the reference is to an importation, removal or bringing of livestock into the United Kingdom from outside it. Nor can the omission of "removed" in article 5 affect the matter. Whatever the reason for this omission, it does not seem to add to or detract from the scope of the word in the relevant parts of the Order. I do not intend to suggest that the words "removed" or "imported" or "brought" are used in those parts as connoting, in relation to the land boundary, merely the actual crossing of that boundary. The process of removal may start well on one side and end well on the other. It may mean a long as well as a short journey and, where vehicles are used, it may be that the removal will not be terminated merely by a transfer from one vehicle to another. Where the removal begins and ends will be a matter of fact to be determined in the light of the circumstances of each case. But as a movement it must be related to the prepositions "from" and "into"; and it would, in my opinion, be an abuse of language to say that the process of removing livestock into Northern Ireland persisted after the cross-border journey had ended and a new and distinct journey had begun. Take, for example, the case of livestock smuggled by X by lorry from a village in Eire to his farm in Tyrone and ten miles from the Border. Some days later at an opportune moment X has the livestock conveyed by the defendant authority to a sale-yard in Belfast. The process of removal into Northern Ireland would, on the view I take, end at X's farm and would not include the subsequent journey to Belfast. If it could include that journey the

removal would have no end, at any rate while the livestock remained alive and in Northern Ireland.

The learned Recorder's second reason for his decision was that, even if the word "removed" had a more limited meaning than the meaning he favoured, nevertheless the defendant's lorry had been used for the "carriage" of the illegally imported cattle within the meaning of article 7(1) of the Order. This raises a more difficult question, though the difficulty lies not so much in the meaning of the expressions "carriage" and "such livestock" in that article as in determining to what period of time the use of vehicles or containers must be related under article 7(1). Should the concluding part of that provision be construed as though it read—"....and any vehicle.... "used *in the course of such contravention* for the carriage.... of such "livestock shall be similarly liable," or, as though it read—"and any "vehicle used *in the course of or after such contravention* for the "carriage.... of such livestock shall be similarly liable?" The defendant contends for the former, the complainant for the latter construction. The actual text seems capable of either interpretation and the choice is, I think, limited to the alternatives I have mentioned. We were referred to the decision of this court in *Graham v. Baldrick*[1] and to certain sections relating to forfeiture of the Customs Consolidation Act, 1876, and the Customs and Excise Act, 1952. I am, however, unable to find guidance in these references. *Graham v. Baldrick*[1] deals with quite a different situation and the Acts of 1876 and 1952 do little more than show that Parliament can enact forfeiture provisions of a very drastic nature when it so wishes. I turn therefore to the terms of the Order and the situation with which it purports to deal.

The conclusion I have reached is that the proper construction of article 7(1) is that contended for by the defendant, namely, that the user which makes a vehicle or container liable to forfeiture is its user in the course of the contravention, that is, in the course of the importation, removal or bringing of livestock into the United Kingdom which is prohibited by article 3. My reasons for this conclusion may be stated as follows:

(1) The scheme of the Order appears to be to relate forfeiture only to a contravention of the Order. The carrier who participates in a breach of article 3 is clearly liable to lose his vehicle under article 7. But, apart from article 4, the carrier who carries illegally imported livestock within Northern Ireland, after the illegal importation has

[1] [1949] N.I. 155.

been completed, does not seem to contravene any provision of the Order: and even if he acts in contravention of article 4 and moves livestock from a point of entry before examination and marking by an authorised officer, there is no provision in the Order for the forfeiture of his vehicle. A breach of article 4 need not mean a breach of article 3 though, no doubt, in practice it often would.

(2) The view just expressed finds support in the concluding words of paragraph (b) of article 12. That article provides for the return of what has been seized, or the money received in respect thereof, where the owner's claim is admitted or upheld by the court. Once the property has been returned or the money received has been repaid that is to be an end of the matter and the Minister is to be under no further liability unless (a) in the case of a seizure of livestock, the court is satisfied "that there was no reason to suspect that the live-"stock had been imported, removed or brought into the United "Kingdom in contravention" of the Order, and (b) in the case of vehicles or containers the court is satisfied "that there was no reason "to suspect that the vehicle or container had been used in con-"travention" of the Order. If the court is so satisfied, the Minister may have to make further amends and it therefore seems but just and proper that this provision should be related closely to article 7(2) which bases the right of seizure on the suspicion of an authorised officer. Such an officer may seize livestock which he suspects have been imported contrary to article 3. The court, finding for the claimant, holds there was no reason for his suspicions and the Minister is not protected by article 12. The officer may also seize the vehicle if he suspects that it "has been used for the carriage .... of "such livestock." The court finds that there was no reason to suspect that the vehicle "had been used in contravention" of the Order. That finding, too, must surely echo the nature of the suspicion on which the right to seize was founded. And, if that be so, the relevant words of article 7(2), and of article 7(1) as well, must be equated to a user in contravention of article 3.

(3) Parliament and, no less, the Ministers responsible for the framing of the Order must, when the Act of 1957 was passed and the Order subsequently made, be taken to have known that the carriage of livestock for reward in Northern Ireland was largely in the hands of the defendant and that, as a public transport authority under the Transport Act (Northern Ireland), 1948, it was under an obligation to provide facilities for such carriage. That is not to say that the defendant was under any statutory compulsion to commit or to aid

and abet the commission of breaches of the Order; but, as I have indicated, the construction placed upon article 7(1) by the complainant would subject the defendant to the forfeiture of its freight vehicles in circumstances quite distinct and remote from any contravention of the law, and would place it, as a public transport authority, in a position of the greatest practical difficulty. A farmer, for instance, might ask the defendant's local depot to transport his cattle from his farm to a sale-yard some distance away. Must the defendant first hold an enquiry to ascertain if the animals in question, or any of them, have been illegally imported at any time previously? The defendant may overlook obvious signs of illegality at its own risk, but it could not possibly be expected to enter upon enquiries of the sort instanced, in order to avoid forfeitures, and yet discharge its public function efficiently. I cannot believe that Parliament or the Ministers concerned ever intended to put the defendant in such a dilemma and I would interpret their legislation accordingly.

(4) If the penalty of forfeiture is to be exacted from the defendant or anyone else, the liability should be imposed in plain and unambiguous terms. Where, as here, there is an ambiguity and the enactment in point fairly admits of a construction that will not involve forfeiture, that construction is to be preferred.

For the reasons stated I would allow the appeal and remit the case with a direction to dismiss the application for forfeiture. The questions for this court are raised by three subparagraphs in paragraph 7 of the case stated. I would answer thus:

(i) The word "removed" in section 6 of the Act of 1957 and in the relevant articles of the Order of 1958 does not mean "moving "livestock from one place to another."

(ii) The lorry was not used for the carriage of cattle so as to make it liable to forfeiture under Article 7(1) of the Order.

(iii) The relevant provisions of the Order are within the powers conferred by section 6 of the Act of 1957. This last point was not argued; but it was conceded before us and I can see no ground for holding otherwise.

BLACK L.J.: I agree, and have nothing to add.

CURRAN L.J.: I also agree and have nothing to add.

Appeal allowed.

Solicitors for the Authority: *J. D. Coates & Co.*
Solicitors for the Minister: *Chief Crown Solicitor.* J.P.

BELFAST CORPORATION v. REILLY[1]

Local Government—Street trading—Whether street photographer engaged in street trading—Street Trading (Regulation) Act (Northern Ireland), 1929 (20 Geo. 5, c. 9), ss. 1, 2—Belfast Corporation Act (Northern Ireland), 1930 (20 & 21 Geo. 5, c. ii), s. 70.

By section 70 of the Belfast Corporation Act (Northern Ireland), 1930, the Corporation is empowered to make by-laws "for regulating and governing "street trading within the City," and in pursuance of this power the Corporation made a by-law which provided, inter alia, that "A person shall not carry "on street trading of any class.... unless he is furnished with a licence from "the Council for such class of street trading....."

The defendant was prosecuted for carrying on street trading without a licence contrary to the by-law. It was proved that he had photographed members of the public in a street in Belfast and offered to supply at a later date prints of such photographs. On the occasion in respect of which he was prosecuted he had received payment for the prints at the time when the photograph was taken.

Held, that since the Act of 1930 contained no definition of "street trading" the court in seeking a meaning of that term might have regard to the provisions of the Street Trading (Regulation) Act (Northern Ireland), 1929; and as the activities treated as street trading by this latter Act did not clearly include the activities of the defendant in the present case there was a substantial doubt, and accordingly the defendant was entitled to the benefit of that doubt and should not be convicted.

CASE STATED by the Resident Magistrate sitting at Belfast Petty Sessions.

The defendant was charged by the Belfast Corporation upon a summons which alleged that he carried on street trading in a street in the City of Belfast without a licence contrary to by-laws. The by-law in question was dated September 2, 1946, and purported to be made under the powers conferred by section 70 of the Belfast Corporation Act (Northern Ireland), 1930. The by-law provided that "A person shall not carry on street trading of any class.... unless he "is furnished with a licence from the Council for such class of street "trading....." Among the powers conferred by section 70 of the Belfast Corporation Act (Northern Ireland), 1930, was power to make by-laws "for regulating and governing street trading within the "City."

At the hearing of the summons it was proved that the defendant had been photographing members of the public walking in a street within the City and offering to supply prints to the persons whom he

[1] In the Court of Appeal before Black and Curran L.JJ. and Sheil J.: June 29 1959.

had photographed. On one occasion in respect of which he was summoned he had received payment for the prints at the time the photograph was taken. The resident magistrate held that the defendant had not been "street trading" within the meaning of that phrase as used in the Act of 1930 and in the by-laws, and accordingly dismissed the summons, but he stated this case at the request of the Corporation for the opinion of the Court of Appeal as to whether he had been correct in law.

Porter for the Corporation. Since neither the Act of 1930 nor the by-laws define the term "street trading," the phrase should be given its natural meaning, and the activities of the defendant would come within the natural meaning of the phrase. In each of the two cases referred to by the resident magistrate in the case stated, the court was dealing with a statutory definition; in *Newman v. Lipman*[1] the definition was "selling.... anything in a street," while in *MacIver v. Robertson*[2], a Scottish case, the phrase was defined as "offering "articles for sale." The judgment of Lord Goddard C.J. in the former case implies that if it had not been for the statutory definition the court would not have restricted the meaning of the phrase, but would have held activities of this sort to be within it.

In this case, there was a completed contract, and it was immaterial that the print was not to be delivered until later. The business of the defendant requires his presence in the street, and it would seem that the object of the legislation was to deal with the nuisance aspect of street trading. Such activities as those of the defendant would be more of a nuisance to members of the public than many other forms of street trading.

[CURRAN L.J.: The Act is aimed at street trading, not at all forms of trading in the street.]

McPherson v. Copeland[3] suggests that a person carrying on his business in the street is a street trader.

[SHEIL J.: Article 9 of the by-laws[4] could not be made applicable in this case.]

That is so. It would only be applicable in the case of a person

1 [1951] 1 K.B. 333.
2 1950 S.C. (J) 56.
3 1956 S.C. (J) 11.
4 By-law 9 of By-laws made September 2, 1946, by the Belfast Corporation in pursuance of section 70 of the Belfast Corporation Act (Northern Ireland), 1930: "Every licensed "person whilst carrying on Street "trading in the City shall have his "name and address legibly and "permanently displayed on his "barrow, cart, stall, tray, basket or "other receptacle."

selling goods, or exposing goods for sale, but selling or exposing for sale are not a necessary element of street trading.

[BLACK L.J.: What, in your submission, constitutes "street trading"?]

Street trading covers any person who transacts or seeks to transact business in the street with members of the public generally.

Appleton for the defendant. This is a penal enactment and is to be strictly construed: see *Tuck v. Priester*[1], per Esher M.R. In my submission, "trading" means buying and selling, or barter: see *Palmer v. Snow*[2], per Channell J. The definition discussed in *Newman v. Lipman*[3] was not a restricted definition, but merely a statement of the ordinary and natural meaning of the term, and the reasoning in that case is applicable to the present case. The terms of the by-laws generally, and article 9 in particular tend to show that the object was to control the activities of those who sell goods, or expose goods for sale in the street.

In the year previous to the passing of the local Act of 1930, Parliament passed a general Act dealing with the same subject matter, namely the Street Trading (Regulation) Act, (Northern Ireland), 1929, and it is clear from the terms of that Act that what Parliament was seeking to deal with was the sale of goods and the exposure for sale of goods in the street. I submit that the same meaning should be given to the term "street trading" for the purposes of the 1930 Act as in the 1929 Act. [He referred also to *Speak v. Powell*[4]].

Porter replied.

BLACK L.J.: We are indebted to counsel for their helpful arguments in this case, which falls within a narrow compass, although that is not to say that it is an easy case to decide. It turns upon one point, whether the acts of the respondent, Patrick Reilly, were "street "trading" within the meaning of that term as it is used in section 70 of the Belfast Corporation Act of 1930, and in the by-laws made pursuant to that section. The case is not an easy one for several reasons, one of which is that neither the Act nor the by-laws made under it contain a definition of "street trading" and much of the argument has been concerned with attempting to define the meaning of the phrase. We suggested that since the Corporation had brought this prosecution for an alleged breach of their by-laws, the Corpora-

1 (1887) 19 Q.B.D. 629, 638.
2 [1900] 1 Q.B. 725.
3 [1951] 1 K.B. 333.
4 (1873) L.R. 9 Ex. 25.

tion was under the obligation to define what was meant by the phrase "street trading" in those by-laws, and Mr. Porter, for the Corporation, eventually said that it meant transacting business, or seeking to transact business in the street with members of the public generally, which would not include the kind of private deal in the street between two individuals referred to by Lord Goddard C.J. in *Newman v. Lipman*[1].

On the facts of the present case it would seem that Mr. Reilly's activities would constitute "trading": he was taking photographs in the street and selling, or endeavouring to sell, the prints which would subsequently come into existence, and, at least on the occasion in respect of which he was prosecuted, he took money for the prints at the time when he took the photographs. While this may have been "trading," that does not determine the question whether it was "street trading" within the meaning of section 70 of the Act of 1930, and on that point we were referred to two cases, the English case of *Newman v. Lipman*[1], and the slightly earlier Scottish case of *MacIver v. Robertson*[2]. In those cases, the courts had assistance which we have not had, in that the Act in question in each case defined what was meant by "street trading," and, while the definitions were substantially the same, it is curious to find that the Court of Justiciary in Scotland came to a different conclusion from that of the King's Bench Division in England; in the Scottish case, which concerned a photographer taking photographs in the street who did not receive money at the time, but only delivered a card stating where the prints might be obtained, the Court of Justiciary held that the defendant's activities constituted "street trading," whereas in *Newman v. Lipman*[1], in which the facts were very similar except that money did pass at the time, the Divisional Court (Lord Goddard C.J., Byrne and Omerod JJ.) declined to follow *MacIver v. Robertson*[2], and held on the facts before them — which, if anything, might have seemed stronger, in that money did pass at the time — that the defendant had not engaged in "street trading." Thus we find three judges in Scotland taking one view of the matter, and three in England taking a contrary view, and the most that one can say in those circumstances is that there is a genuine doubt as to the point. That does not, however, exempt us from coming to a conclusion of our own as to what constitutes "street trading" for the purposes of the present case and as to whether Mr. Reilly was indulging in that activity.

As I have said, in each of the cases referred to the court had the

[1] [1951] 1 K.B. 333. [2] 1950 S.C. (J) 56.

benefit of a statutory definition of street trading, whereas we have no such definition, and have therefore to cast about for one, and to inquire what the term as used in the Act of 1930 is intended to mean in order to find whether the activity with which we are dealing should be included in it. In order to ascertain the meaning of the term as used in the statute, and what the Legislature intended to be included in it, it is, I think, legitimate to see whether Parliament itself has given any indication of what it meant by "street trading," and we find that in 1929, the year before the Belfast Corporation Act was passed, Parliament saw fit to enact a public general Act to deal with the regulation of "street trading." The short title of that Act is the Street Trading (Regulation) Act (Northern Ireland), 1929. The Act does not contain any definition of street trading but the activities with which it was seeking to deal are to be gathered from section 1 of the Act. From a perusal of that section it would seem that the activities there referred to would not clearly include activities such as those of Mr. Reilly in the present case. A reading of section 2 tends to confirm this impression, and from these two sections it would appear that street trading as dealt with by the Legislature in 1929 might be taken as meaning the selling of goods in the street, from a vehicle or other receptacle, or without such vehicle or receptacle.

There is therefore a substantial doubt about the matter, and in such a case it is trite law that the benefit of an ambiguity arising on the construction of a statute must be given to a person prosecuted under the statute, who should not be held guilty of a criminal offence unless it has been clearly enacted that his conduct should constitute a criminal offence. This principle of construction of penal statutes is well established; it was laid down by Lord Esher M.R. in *Tuck v. Priester*[1] to which Mr. Appleton referred us; and it has been emphasised again and again in later cases. In *Remmington v. Larchin*[2] Scrutton L.J. said, "the benefit of the doubt should be given to the "subject and against the Legislature which has failed to explain "itself," and in *London and North Eastern Railway Co. v. Berriman*[3] Lord Simonds, in words which have since been frequently quoted with approval, stated the proposition as follows: "a man is not to be "put in peril upon an ambiguity, however much or little the purpose "of the Act appeals to the predilection of the court." In the case of street photographers, as was said in *Newman v. Lipman*[4] it may be that some people regard such persons as pests who should be removed from the streets, but in order to hold such persons guilty of

1 (1887) 19 Q.B.D. 629, 638.
2 [1921] 3 K.B. 404, 410.
3 [1946] A.C. 278, 313.
4 [1951] 1 K.B. 333.

an offence it must be clear that the Act or by-laws under which they are prosecuted cover their activities. The matter is clearly a doubtful one as is shown by the difference of opinion between the Scottish and English courts, and in view of the fact that the Act gives no definition, and that the only clue which we have as to what was intended by Parliament is what is contained in the public statute passed in the previous year, I do not think the matter is sufficiently clear to justify the conviction of the respondent in the case.

Accordingly, I would agree with the view taken by the resident magistrate, and would hold that his decision was correct, and that the question asked in the case stated should be answered by saying that he was right in law in holding as he did.

CURRAN L.J.: I concur.

SHEIL J.: I agree.

Appeal dismissed.

Solicitor for the Corporation: *J. A. Young.*
Solicitor for the defendant: *L. I. G. Fox.*

J.P.

NOBLE v. NOBLE[1]

Husband and wife—Maintenance proceedings in the High Court—No jurisdiction to make order regulating custody of or access to children of the marriage—Law Reform (Miscellaneous Provisions) Act, (Northern Ireland), 1951 (c. 7), ss. 4, 5.

In proceedings brought by a wife in the High Court for maintenance on the ground that her husband has been guilty of wilful neglect to provide reasonable maintenance for her or the infant children of the marriage, the court has no jurisdiction to entertain an application by the husband for an order regulating the custody of or the husband's access to the children of the marriage.

PRELIMINARY OBJECTION IN POINT OF LAW on the hearing of an application by a husband for the variation of a maintenance order made against him pursuant to section 4(1) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1951[2].

In 1955 a wife applied for and obtained an order for maintenance against her husband on the ground that he had been guilty of wilful neglect to provide reasonable maintenance for her and the infant child of the marriage. The order was made on the basis that the child, who was then very young, should remain with his mother, and the sum awarded for maintenance was fixed on that basis. Subsequently the parties reached an agreement as to the times when the husband might have access to the child. In 1959, the husband found the arrangements for access unsatisfactory, but the wife refused to agree to change them, and the husband applied to the court upon a summons in the matter of the wife's original application for an order (a) apportioning the sum originally awarded as between the wife and the child; (b) reducing the amount awarded by a specified amount; (c) alternatively, that a condition be attached to the original order that the husband should have access to the child at certain specified times on certain specified days. It was admitted by the husband that the sole object of the application was to secure access to the child and to regulate its custody.

[1] In the Queen's Bench Division (Matrimonial) before Lord MacDermott L.C.J.: April 22, 1960.

[2] Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1951, section 4(1): "Where a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the High Court, if it would have jurisdiction to entertain proceedings by the wife for judicial separation, may, on the application of the wife, order the husband to make to her such periodical payments as may be just; and the order may be enforced in the same manner as an order for alimony in proceedings for judicial separation."

Brown Q.C. and *McBirney* objected on behalf of the wife that the court had no jurisdiction to make an order of the kind sought.

Reid Q.C. and *McConnell* for the husband. We accept that there is no direct method by which the court can deal with questions of access and custody of this sort, for the Northern Ireland Act, unlike the corresponding English legislation, contains no express provision on the subject, but we submit that the court can achieve the desired result indirectly, by imposing a condition on the order for maintenance providing that the order shall not have effect unless the wife complies with certain terms as to access (which would be rather drastic) or by providing that the amount payable under the order for the maintenance of the wife herself should be reduced if she fails to comply with the terms.

The original order was made under section 4(1) of the Act of 1951 and section 5 of that Act confers upon the court power to vary such an order by incorporating the powers conferred on the court in matrimonial causes by section 19(6) of the Matrimonial Causes Act (Northern Ireland), 1939. The result is that the court, when varying an order made under section 4 of the 1951 Act, may put into it any provision which might have been included in the original order. Section 4, of the 1951 Act does not mention custody or access, but by virtue of section 27(7) of the Supreme Court of Judicature Act (Ireland), 1877, the court has a general power, which is expressed to be conferred for the avoidance of multiplicity of proceedings, to "grant.... on such reasonable terms and conditions as.... shall "seem just, all such remedies whatsoever as any of the parties thereto "may appear to be entitled to....." Accordingly, we submit that on an application for an order under section 4 of the Act of 1951, the court would have power to deal with custody and access by means of conditions attached to the order for maintenance, and that the court has a like power to impose such conditions on the present application.

If the court has not such a power, separate proceedings would be necessary, and there would be a "multiplicity of proceedings" of the kind which section 27(7) of the Judicature Act, 1877, sought to avoid. This would be particularly undesirable in a case like the present, for the only other proceedings which could be brought would be by way of an application for habeas corpus, by way of proceedings under the Matrimonial Causes Act, or by having the child made a ward of court, for the Guardianship of Infants Act, 1886, would not be applicable. In any of the three possible types of proceedings the matter of custody or access would be in the nature of ancillary relief.

It is undesirable to have further proceedings in a case of this kind, for such proceedings would tend to aggravate the differences between the parties.

The power conferred on the High Court by section 27(7) of the Judicature Act, 1877, was not in fact a new power, but only a statutory expression and extension of a power which existed at common law, conditions being attached to orders to avoid procedural difficulties, for example, in actions for detinue.

[LORD MACDERMOTT L.C.J. We are dealing with a special and limited statutory jurisdiction, and I cannot see that it gives any power to deal with questions of custody.]

We acknowledge that there is no express power given by the Act of 1951 but rely upon the general power conferred by section 27(7) of the Judicature Act, 1877; that section is applicable to cases where a new jurisdiction is conferred on the court by a subsequent Act.

[LORD MACDERMOTT L.C.J. In England, the Legislature has expressly conferred jurisdiction on the court. Do you suggest that it was unnecessary to do so?]

It does not follow from our argument that the English legislation was unnecessary. In many cases the procedure under section 27(7) of the Act of 1877 would be of no assistance. For example, if in the present case it were the wife who wished to obtain access it would serve no useful purpose to impose a condition. Even if there were a provision here corresponding to section 4 of the English Matrimonial Proceedings (Children) Act, 1958, it might still be preferable to grant relief in a case of this sort by adding a condition to the order, for the reason that a direct order for custody or access could only be enforced by attachment for contempt, which would be very undesirable in proceedings between a husband and wife in relation to access to their child.

Brown Q.C. and *McBirney* for the wife were not called upon to reply.

LORD MACDERMOTT L.C.J.: The present application is brought in a matter which was originated by the wife of the applicant under the provisions of section 4 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1951. That section provides that this court may make orders for maintenance in certain circumstances, the fundamental requirements being that the husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or the

infant children of the marriage, and that the High Court would have jurisdiction to entertain proceedings by the wife for judicial separation. That section was invoked by the wife in this case, and the proceeding resulted in an order made in December 1955, after a lengthy hearing. That order was made on the basis that the child, who was then very young, should remain with the mother, and there is no doubt that the sum awarded for maintenance was fixed on that basis. The husband respondent now makes application in the same matter for an order for the apportionment of the amount awarded between his wife and the child, and for a reduction of the amount of the wife's maintenance; or alternatively that a condition be attached to the order of December 1955, whereby he may be granted access to the child during certain hours on certain days.

It is admitted that the whole object of this application is to secure access to the child and to regulate its custody. It is not suggested that the child should be taken away from the mother, but that provision should be made that the father may have access, and the initial question is whether that can be done in these proceedings, and on the application of the respondent. In England the situation is different, for the statutory provisions applicable there have been amended so as to provide for this kind of application; but that is not so here and I have to decide whether I have jurisdiction to entertain such an application in these proceedings.

I am satisfied that I have no such jurisdiction, and that I should not assume jurisdiction in a grave and difficult matter like this. I am sure that if the Legislature had intended to confer upon the court the power to deal with these matters, it would have said so clearly. It would be going too far, having regard to the terms which Parliament has used, to hold that in proceedings under section 4 of the Act of 1951 brought at the suit of a wife, the court could make an order at the suit of the husband to regulate his access to a child of the marriage.

I accordingly dismiss the application with costs.

Summons dismissed.

Solicitor for the husband: *Leslie Morris.*
Solicitor for the wife: *Paul Campbell.*

J.P.

ANDREWS v. DUNN & CO., LTD.: BELFAST ROPEWORK CO., LTD. (THIRD PARTY)[1]

Practice — Third party procedure — Whether prima facie case shown against third party — Third party the manufacturer of goods alleged by plaintiff to have caused his injury — R.S.C. Or. 16, r. 52.

The plaintiff injured his eye with a needle while he was engaged in stitching mattresses for his employers, the defendants, and he alleged that his injury was caused by the snapping of twine supplied to him by the defendants for his work. The defendants, having issued a third party notice against the manufacturers of the twine, made an application for third party directions grounded upon an affidavit which set out the claim made by the plaintiff, deposed to the fact that the third party had supplied the twine to them, and showed that they could not have examined the twine prior to its use by the plaintiff.

Held, that the defendants had made out a sufficient prima facie case against the third party to warrant third party directions.

Fox v. Armagh Education Authority [1956] N.I. 171 explained.

APPLICATION under Order 16, rule 52, by the defendants for third party directions.

The facts appear sufficiently in the headnote.

McIvor for the plaintiff applied for the adjournment of the application so that the plaintiff might consider whether he should apply to have the third party made a defendant.

Chambers for the defendants. I submit that it is clear from *Davie v. New Merton Board Mills Ltd.*[2] that if the plaintiff in this action can establish a case against the defendants, then the defendants would be entitled to be indemnified by the third party. The issue is open at the present stage, but I submit that it must be assumed for the purposes of this application that the plaintiff will be able to establish a case against the defendants, for there is no other basis upon which the court could deal with this application.

MacDermott for the third party. In *Fox v. Armagh Education Committee*[3], your Lordship held that the onus was on a defendant seeking to bring in a third party to establish, prima facie, that he would be entitled to contribution or indemnity from the third party. I submit therefore that the defendants in this case must show, prima facie, that the plaintiff, if he had sued the third party, would have succeeded against them, for the right to a contribution or an in-

[1] In the Queen's Bench Division before Lord MacDermott L.C.J.: Dec. 11, 1959.
[2] [1959] A.C. 604. [3] [1956] N.I. 171.

demnity given by the Law Reform Act, 1937, is a right against a party who "would, if sued, be liable."

[LORD MACDERMOTT L.C.J. Is a defendant not entitled to say: "If the plaintiff can succeed against me, which I do not accept, then "the third party would be liable"?]

The Act says *would*, if sued, be liable, not *might*, if sued, be liable. In this case there is no evidence at all against the third party. The defendants only say that they purchased the twine from the third party, and that they could not reasonably have examined it before use, but, according to Order 16, rule 52, the court, before giving directions for the trial of an issue between a defendant and a third party, must be satisfied that there is an issue to be tried between the defendant and the third party. That rule is different from the corresponding English rule, Order 16a, rule 7(1), which is wider in its scope, for under it the court may make an order if satisfied that there is a question or issue proper to be tried as between the plaintiff and the defendant and the third party or between any or either of them.

[LORD MACDERMOTT L.C.J. It cannot be the case that a defendant must show, prima facie, that he is liable to the plaintiff in order to bring in a third party, although the right to contribution or indemnity is based on the liability of the defendant.]

I submit nevertheless that the defendant must show a prima facie case against the third party; it is done in road accident cases, and might have been done in *Fox v. Armagh Education Committee*[1] if the facts had warranted it; and the same principle is applicable in the present case. There is nothing in the affidavit grounding this application to show that the plaintiff's injuries were caused by the breaking of the twine, or to show that the twine was in any way defective; indeed, there is no evidence that the twine snapped at all.

[LORD MACDERMOTT L.C.J. The defendants in this case are in a practical difficulty, in that it is the negligence, if any, of the defendants themselves which gives rise to the issue as to the negligence of the third party.]

That may be a reason for the difference which is to be found in the English Rules.

Chambers in reply. In the first place, the defendant is asking the court to decide the issue as to the liability of the third party at this stage, but that, of course, cannot be done until the facts of the case

[1] [1956] N.I. 171.

have been fully investigated. It is true to say that the plaintiff will have to go further than to establish that the twine broke if he is to succeed, but he may in fact be able to make a much stronger case. The court does not have to determine for the purposes of this application whether either the defendant or the third party will be found liable to the plaintiff, but only whether, in the words of Order 16, rule 52, there is an issue proper to be tried.

Secondly, if the argument advanced on behalf of the third party is correct, a defendant would have to admit his own liability in order to bring in a third party, for the right to contribution or indemnity is dependent on the liability of the defendant. The position may be simpler in road accident cases, but even in those cases, on the third party's argument, a defendant would have to admit his own liability, which is never done in practice.

It is in accordance with the Rules for a defendant to say that certain allegations have been made by the plaintiff, and that, if those allegations be true, then the third party is a party who would, if sued, be liable. It is significant for this purpose to notice the following sentence from the judgment in *Fox v. Armagh Education Committee*[1]: "It may be that the original suppliers of this hammer *which is alleged to have been defective* should be brought in as parties." The real point of the decision in that case is that it is difficult to bring in as a third party a supplier of goods who is not also the manufacturer, because such a supplier may not be responsible for the condition of the goods. In this case, the position is different, for we are dealing here with a supplier who also manufactured the goods.

LORD MACDERMOTT L.C.J.: This is an interesting application, relating to an accident of a rather uncommon type, but I do not propose to refer to the facts any further than is necessary for the purposes of the present motion. The question it raises is whether the defendants have shown enough to justify taking the third party proceedings which they have instituted a stage further, by having directions given for the trial of the issues between them and the third party. Counsel for the plaintiff has asked that the application should be allowed to stand over, so that the plaintiff may have an opportunity of considering whether he should take steps to have the third party joined as a defendant. I do not express any view as to whether that would be a wise course for the plaintiff to pursue, but he can still do so after this

[1] [1956] N.I. 171.

application has been dealt with and I think it is preferable that it should now proceed.

I have been asked by counsel for the third party to apply a decision of my own in this court, in the case of *Fox v. Armagh Education Authority*[1]. There the plaintiff, while attending a wood working class run by the defendant Authority, had his eye damaged, as he alleged, by a chip of metal which flew off a hammer he was using; he sued the defendant Authority for damages for negligence, and the Authority sought to bring in as third party William Johnston, Son & Co. Ltd., the hardware merchants from whom they had purchased the hammer. Now if William Johnston, Son & Co. Ltd. had been the manufacturers of the hammer in that case, it would have been almost on all fours with the present case, but, in point of fact, they were not the manufacturers but only the retail suppliers. The application in that case was refused because a prima facie case had not been made out against the third party. In the course of my judgment I said[1]: "It may "be that the original suppliers or manufacturers of this hammer which "is alleged to have been defective should be brought in as parties. I "have not to decide that: on this application, I have to take rule 52 of "Order 16 as it stands. I think the defendants have to show that they "are, prima facie, entitled either to contribution or indemnity against "the suppliers they bought from, and who, it is admitted are not the "manufacturers. I do not think Mr. Brown has shown a prima facie "case against the third party."

Here the position is quite different. The third party not only sold but manufactured the twine, the snapping of which is alleged to have caused the accident, and the authorities show that the manufacturer of goods intended to be used as they are sent out may well be under a duty to take care which does not rest upon the non-manufacturing retailer. I do not say any such duty has in fact been breached by the third party, or that the third party is necessarily liable to the defendants contractually; but I am of the opinion that the defendants have made a sufficient prima facie case to entitle them to the order they now seek.

Order giving directions in the usual form.

Solicitors for the plaintiff: *Glass & Lavery.*

Solicitors for the defendants: *McKinty & Wright.*

Solicitors for the third party: *Johns, Elliot, Wallace & Co*

J. P.

[1] [1956] N.I. 171.

PORTADOWN BOROUGH COUNCIL v. MOORE[1]

Public health —Private improvement expenses - Demand for payment of share of estimated cost of works served on owner with notice of apportionment— Whether valid demand— Further demand served after expiry of time for appeal against apportionment—Proceedings for recovery of sum demanded brought within six months of second demand—Whether proceedings out of time- Public Health (Ireland) Act, 1878 (41 & 42 *Vict. c.* 52), *ss.* 28, 250, 255, 268—*Local Government Act (Northern Ireland)*, 1934 (24 & 25 *Geo.* 5, *c.* 22), *s.* 28.

The defendant was the owner of premises abutting on a private street and he and other frontagers on the street were served by the borough council with a notice (hereinafter referred to as the "works notice") requiring them to make up the street. These works notices not having been complied with the borough council, acting under the provisions of section 28 of the Public Health Act (Ireland), 1878, as amended by section 28 of the Local Government Act (Northern Ireland), 1934, served on the frontagers on February 28, 1957, a document (hereinafter referred to as the "first demand notice") setting out the estimated cost of the works, the amount apportioned on each frontager in respect of his premises, and coupled with a demand for the payment of such apportioned sum within one month.

By section 28 of the Act of 1878 an owner may take the question of his proportion of the cost to arbitration, and by section 255 of that Act he has three months from the service of the demand notice in which to exercise this right, otherwise the apportionment becomes binding and conclusive upon him. By section 268 of the Act of 1878 an owner has the right to appeal to the Ministry of Health and Local Government against the works notice and by that section he has three weeks from the service of the demand notice in which to lodge his appeal.

Certain frontagers other than the defendant forthwith appealed to the Ministry against the works notice and this appeal was dismissed on August 20, 1958. The defendant took no steps to contest either the works notice or the first demand notice.

By sections 250 and 255 of the Act of 1878 summary proceedings for the recovery of expenses under the Act must be commenced within six months reckoned from the date of service of the demand notice. The borough council took no steps against the defendant pending the determination of the appeal by the other frontagers and after the dismissal of that appeal, taking the view that any proceedings against the defendant on the first demand notice were out of time, they served a second demand notice on the defendant on September 23, 1958, and commenced proceedings by summons on December 9, 1958, for the recovery of the amount of the demand.

It was contended by the defendant, firstly, that the first demand notice was a valid document and proceedings thereon were statute barred; and, secondly, that in any event the borough council was precluded from denying the validity of that demand. It was contended for the borough council that the

[1] In the Court of Appeal before Lord MacDermott L.C.J., Black and Curran L.JJ.: Sept., 21, Oct. 5, 6, 1959; Feb. 19, 1960.

first demand notice was a nullity and that the only relevant demand was that in the second demand notice.

Held, (i) that the first demand notice was invalid by reason of the fact that it had been served before the time for taking the apportionment to arbitration had elapsed;

(ii) that the borough council was not precluded from denying the validity of the first demand notice;

(iii) that, accordingly, the second demand notice was a valid demand, and the proceedings commenced within six months of that demand were validly brought.

Semble that an appeal by frontagers other than the defendant would not have rendered nugatory a valid demand served on the defendant.

CASE STATED by the Resident Magistrate sitting at Portadown Petty Sessions.

The defendant was the owner of premises abutting on a private street known as Alexandra Avenue in the Borough of Portadown, and on March 28, 1956, the Borough Council served upon him and the other owners of premises abutting on the street a notice under the Public Health Acts requiring them to make up the street. These notices were not complied with, and the Council, having made an estimate of the probable cost of the works required to be done, and apportioned the amount among the various frontagers, served on the defendant a notice signed by the borough surveyor setting out the estimated cost of the works required to be done and stating that the sum of £537 16s. 10d. had been apportioned by the surveyor on the defendant in respect of his premises; this document, which was dated February 28, 1957, also contained a further notice, signed by the Town Clerk, demanding payment of the sum apportioned on the defendant within one month.

A number of the frontagers other than the defendant presented a memorial to the Ministry of Health and Local Government dated March 6, 1957, appealing against the notices and demands which had been served on them, and the Ministry thereupon directed a public inquiry. This inquiry was held on November 20, 1957, and the Council appeared at it. By letter dated August 20, 1958, the Ministry gave notice of its decision that the appeal should be dismissed.

On September 23, 1958, a further demand for payment of the sum of £537 16s. 10d. was served on the defendant, but it was not complied with and on December 9, 1958, the Council issued a summons for the recovery of that amount. On the hearing of the summons, the resident magistrate held, (1) That there was a six months limitation

period on the commencement of proceedings by the Council from the date of demand, by virtue of sections 250 and 255 of the Public Health (Ireland) Act, 1878; (2) That the notice served on February 28, 1957, was not a demand within the meaning of the said section 255, as such notice had been rendered nugatory by the presentation of the memorial to the Ministry; that demand was not made until September 23, 1958, after the Council had been notified by the Ministry of the result of the inquiry ordered to be held on foot of the memorial and accordingly, the proceedings dated December 9, 1959, were within the period of limitation; (3) That the evidence of the presentation of the memorial and the result of the inquiry following was admissible inasmuch as the liability or otherwise of one of the frontagers was indivisible from the liability or otherwise of all the frontagers as a body and, therefore, the presentation of the memorial and the results of the subsequent inquiry were facts relevant to the issue in this case; and (4) that certain objections by the defendant to the wording of the process were of no substance. He therefore made a decree in favour of the Council, but at the request of the defendant stated this case for the opinion of the Court of Appeal as to whether he was correct in holding as he did.

When the case came on for hearing before the Court of Appeal, counsel for the Council stated that they did not propose to rely upon the effect of the memorial by the other frontagers upon the demand dated February 28, 1957, but would contend that that demand was invalid for the reason that it had been premature. Counsel for the defendant objected that this was a point which had not been made previously, and that they were taken by suprise, and the case was adjourned to enable the defendant to consider the matter.

Brown Q.C. and *Kennedy* for the defendant and appellant. If the demand dated February 28, 1957, was a valid demand, time began to run from the date of that demand and the summons was out of time. Two questions therefore arise for consideration, namely, (i) whether it was a valid demand, and (ii) whether the Council is precluded from denying its validity.

It appears that the Council now seeks to rely on the case of *Simcox v. Handsworth Local Board*[1]. In that case the sanitary authority served a notice of apportionment and a demand for payment on the appellant, who took no step to dispute the apportionment within the prescribed time, and it was held that in proceedings for the recovery of the apportioned sum she was bound by the amount

[1] (1881) 8 Q.B.D. 39.

of the apportionment, and further that a demand for payment with the notice of apportionment was not a valid demand. We would submit that this latter part of the decision was based on a misapprehension of the effect of *Grece v. Hunt*[1]. That case decided that a demand for payment was necessary, and that time ran from the date of the demand and not from the date of the notice of apportionment, but it did not decide that a demand could not be served with the notice of apportionment. Moreover, it may be that *Simcox v. Handsworth Local Board*[2] is distinguishable from the present case. It is not clear from the report, but it would seem that in that case there was only one notice served in the first instance, though it did demand payment, but in the present case we have in effect two distinct notices, one signed by the surveyor specifying the amount of the apportionment, which is his responsibility, and another distinct notice signed by the town clerk demanding payment to the Council.

Wilson v. Mayor of Bolton[3] would seem to suggest that in a case where the notice of apportionment and the demand are served together, the demand remains in suspense during the period allowed for an appeal against apportionment, for Lush J. said in that case that the local board had nine months from the date of the demand in which to bring summary proceedings to recover the sum due. That case was later approved by the Court of Appeal in England, and was referred to by Andrews L.J. in *Bangor Borough Council v. Graham*[4].

The other point is whether the Council is precluded from denying the validity of the first demand. It would appear from *Reg. v. Local Government Board*[5] that the "decision" of the local authority in a case such as the present which can be the subject of an appeal by way of memorial to the Ministry is the decision to demand payment, and thus we would submit that the Council in this case is precluded from saying that the first demand was not a valid demand by reason of its having participated in the appeal to the Ministry. We have not found any case dealing directly with the point in relation to proceedings by a sanitary authority, but reference to the general principles to be applied in a situation of this sort are to be found in *Venning v. Loyd*[6]. [They also referred to *Gould v. Bacup Local Board*[7].]

Patton Q.C. and *McQuitty* for the Council. We rely on *Simcox v. Handsworth Local Board*[2]. No proceedings can be commenced, nor can time begin to run until a valid demand for payment has been

1 (1877) 2 Q.B.D. 389.
2 (1881) 8 Q.B.D. 39.
3 (1871) L.R. 7 Q.B. 105.
4 [1933] N.I. 34.
5 (1882) 10 Q.B.D. 309.
6 (1859) 1 De G. F. & J. 193.
7 (1881) 44 L.T. 103.

made; in this case there was no valid demand until September 23, 1958, and thus the proceedings for recovery of the money demanded were in time. *Grece v. Hunt*[1] shows clearly that a demand for payment is necessary, and *Simcox v. Handsworth Local Board*[2] shows that a demand within the time allowed for appeal against apportionment is invalid.

[LORD MACDERMOTT L.C.J. The court in that case did not hold that a demand could not be made within the period of three months allowed for an appeal.]

[CURRAN L.J. What the court said was that the demand served with the notice of apportionment was unnecessary, not that it was invalid.]

It would be absurd if the local authority could bring proceedings to recover the sum demanded from the owner at a time when the owner still had a right of appeal against the apportionment made on him, particularly having regard to the fact that the amount of the apportionment is not subject to review in recovery proceedings at petty sessions.

[LORD MACDERMOTT L.C.J. Does the change brought about by section 28 of the Local Government Act (Northern Ireland), 1934, affect the matter? Subsection (d) of that section would seem to suggest that, after default, a demand for payment of the actual or estimated expenses may be enforced under section 28 of the Act of 1878, and that, while the demand may be enforceable, any dispute as to the proportion of the expenses payable by the owner may nevertheless be settled by arbitration.]

We would submit that an appeal to the Ministry would lie in cases under section 28 of the Act of 1934 in precisely the same way as under the earlier Act. There is certainly nothing in the Act of 1934 to show that it was intended to take away the owner's right of appeal, and such intention ought not to be attributed to the Legislature in the absence of a clear indication that that result was intended.

The other point made by the defendant is that the Council is in some way estopped from saying that the first demand was invalid, but the principle of estoppel is that one party has represented to the other that certain facts are correct, and is thereby precluded from denying those facts. In this case, however, there was no representation to the defendant, who took no part in the appeal of the other frontagers, and the only possible representation to him would have

[1] (1877) 2 Q.B.D. 389. [2] (1881) 8 Q.B.D. 39.

been the letter informing him of the result of the appeal. Again, there can be no estoppel by record, because the defendant was not a party to the appeal: see Halsbury, Laws of England, 3rd ed., vol. 15, p. 196.

[They also referred to *Re Bettesworth and Richer*[1], *Jacomb v. Dodgson*[2]; *Simm v. Anglo-American Telegraph Company*[3].)

Brown Q.C. replied.

Cur. adv. vult.

LORD MACDERMOTT L.C.J.: By notice dated March 28, 1956, the defendant and others were required to carry out the street works specified therein at Alexandra Avenue, a private street within the district of the complainant Council. This notice was served on the defendant as an owner of premises abutting on Alexandra Avenue under the provisions of section 28 of the Public Health (Ireland) Act, 1878, as amended by section 28 of the Local Government Act (Northern Ireland), 1934. By the notice the defendant and the other frontagers were given three months within which to execute the said works. The notice was not complied with by the defendant, or by the others served, and on February 28, 1957, the defendant was served with a further notice apportioning his share of the estimated expenses of the said works in the sum of £537 16s. 10d. and demanding payment of that amount, with a threat of summary proceedings if payment was not made within a month. This notice was a single document in two distinct parts, the first, signed by the surveyor, being the apportionment, and the second, signed by the town clerk, being the demand for payment. This demand purported to be made under paragraph (b) of section 28 of the Act of 1934 which empowers urban authorities, such as the Council, to demand from each owner, who was failed to comply with a notice requiring the execution of street works, his share of the estimated expenses. This paragraph ends by saying "and such owner shall on demand pay the said amount to "the urban authority."

It was open to the defendant to take either or both of two courses if he wished to dispute the liabilities which the notices I have mentioned—I shall speak of them as the "works notice" and the "first "demand notice" respectively—sought to place upon him. He could take the question of his share or proportion of the expenses to arbitration under section 28 of the Act of 1878 and section 28 (d) of the Act of 1934. He had three months from the date of service of the first demand notice within which to do this: see section 255 of the Act

[1] (1888) 37. Ch.D. 535.
[2] (1863) 3 B. & S. 461.
[3] (1879) 5 Q.B.D. 188, 206.

of 1878. The defendant did not take this course and it would therefore appear that, as from the end of May 1957, the apportionment set out in the demand notice had, in the words of section 255, become "binding and conclusive" upon him.

The second course open to the defendant was to challenge the works notice of March 28, 1956, by an appeal to the Ministry of Health and Local Government under section 268 of the Act of 1878. He had three weeks from service of the first demand notice within which to take this step, but he did not so do.

The other frontagers seem to have had similar demand notices served on them. They, however, did appeal under section 268, their memorial to the Ministry being dated March 6, 1957. This appeal was dismissed by the Ministry on August 20, 1958. It is to be noted that the last paragraph of section 268 provides that on an appeal thereunder being duly taken, "any proceedings that may have been "commenced for the recovery of such expenses by the sanitary "authority shall.... be stayed."

Under section 28 of the Act of 1878 and section 28 (d) of the Act of 1934 the expenses payable by a frontager thereunder may be recovered in a summary manner. In fact, the Council did not take any summary proceedings until after the appeal already mentioned had been dismissed by the Ministry. Then, owing to the delay which had occurred in determining that appeal, the Council had to face the implications of sections 250 and 255 of the Act of 1878. The former of these sections provides that a complaint under that Act must be made within six months from the time when the matter of such complaint arose, and the latter section enacts that in all summary proceedings for the recovery of expenses of the kind now in question ".... the "time within which such proceedings may be taken shall be reckoned "from the date of the service of notice of demand."

By the time the appeal to the Ministry had been dismissed this six months period, if reckoned from the service on February 28, 1957, of the first demand notice upon the defendant, had long since expired. The Council, accordingly, took the step of serving a new demand for the said sum of £537 16s. 10d. This, the second demand notice, was served on September 23, 1958, and then, by summons dated December 9, 1958, the Council started the present proceedings for recovering the amount of the demand.

The issue before the resident magistrate was whether the claim was statute barred. He held that it was not, on the ground that the first demand notice served on February 28, 1957, had been rendered

nugatory by the presentation of the memorial by the frontagers other than the defendant, and that the demand from which time ran was that made by the notice served on September 23, 1958, within six months of the service of the summons.

If the first demand notice served on February 28, 1957, was ever an effectual demand I can see no ground for saying that it was rendered nugatory by the appeal to the Ministry. Any proceedings brought on foot of the demand contained in that notice would have been stayed under section 268 of the Act of 1878 pending the determination of the appeal, but I find difficulty in regarding this provision as having any effect upon the validity of the demand already made and, as a matter of construction, the demand itself would not, in my opinion, be a proceeding to which section 268 applied.

Before this court, the Council did not rely on that ground. Instead, the contention advanced on its behalf was that the first demand notice of February 28, 1957, was a nullity from the beginning as the demand made thereby was for payment within the three months during which the defendant was entitled to take the matter of the apportionment to arbitration, and, accordingly, that the only relevant demand was that of September 23, 1958. For the defendant, on the other hand, it was submitted that the first demand notice was always a valid demand and that summary proceedings could have been taken on foot of it at any time within six months from the date of service thereof.

One of the difficulties in this case is due to the manner in which section 28 of the Act of 1878 has been amended by section 28 of the Act of 1934. There is no express repeal of any part of the older enactment. The new section 28 is, as it were, laid on top of the older section and it is not altogether easy to say where the process of amendment ends. In view of this it will be convenient to consider, first of all, the position before section 28 of the 1934 Act was passed, and then to see what changes, if any, of a relevant nature that section has made.

In order to render a frontager liable for his proportion of street expenses it is clear that there must first be served upon him—(i) notice of the apportionment showing the amount apportioned to him according to his frontage, and (ii) a demand for payment of the apportioned amount. But it is not so clear on the authorities how these two requirements bear on each other as respects the computation of time under section 250 of the Act of 1878. As already noted, the frontager has three months within which to challenge the appor-

tionment made upon him. Can a valid demand be made during that time? And if it can, and a demand is so made, does the limitation period of six months start to run from the date of the demand or from the expiry of the three months or such other time as may elapse before an award issues on any appeal to arbitration that may be taken regarding the apportionment? In *Jacomb v. Dodgson*[1], the judgment of Cockburn C.J. indicates that the six months' period starts to run at the end of the three months. Much the same view is expressed in *Wilson v. Mayor of Bolton*[2], a case in which the notice of apportionment and the demand for payment appear to have been delivered on the same day. There, Lush J., after referring to the limitation period and the three months given to dispute the apportionment, says[3]: "Therefore, at the expiration of nine months from the "time at which the notice demanding payment was served upon the "appellant, the right of the local board to take summary proceedings "to recover the sum due from the appellant was barred." In *Grece v. Hunt*[4], the notice of apportionment indicated that the amount apportioned was the amount to be paid by the frontager. That notice was dated April 12, 1875, and no notice to dispute the apportionment was given within the statutory period of three months. Then, on July 31, 1875, a formal demand for payment was served on the frontager and on January 31, 1876—just within the six months—summary proceedings were taken to enforce this demand. It was held that the limitation period ran from the formal demand and not from the service of the notice of apportionment, and the distinction between these documents is drawn by Field J. in a passage in his judgment which reads thus[5]: "This being so, the question then arises "whether the notice of apportionment of the 12th of April was a "sufficient demand within the 62nd section, and we answer that "question in the negative.

"Our reasons for this are that the notice of apportionment is "designed to fulfil a very different office from the notice of demand. "It is a step in the machinery provided for the purpose of ascertaining "the liability of the owner; there is not at the time it is served any "liability to pay the apportioned sum, nor can there be, until the "lapse of three months afterwards, and in the event of the owner "successfully disputing the apportionment, that sum so apportioned "will never become due."

A reference to payment is not unnatural in an apportionment

1 (1863) 3 B. & S. 461.
2 (1871) L.R. 7 Q.B. 105.
3 Ibid. 111.
4 (1877) 2 Q.B.D. 389.
5 Ibid. 396.

notice, having regard to the purpose of the apportionment, and in *Simcox v. Handsworth Local Board*[1] also, the apportionment notice sought payment. The three months having elapsed without any resort to arbitration, a formal notice of demand was served and this was followed within six months by summary proceedings. The court overruled the submission that the claim was statute barred, Grove J. saying[2]: "And there is no ground for contending that the proceedings "are out of time, for the fact that the notice of the amount appor- "tioned on the appellant also requested payment of the amount did "not, according to *Grece v. Hunt*[3], make it a notice of demand under "s. 257. This notice of demand is made three months after service of "the notice of apportionment, and an unnecessary demand before "this period has elapsed is immaterial."

The English enactments governing the decisions to which I have referred were, in their material parts, substantially akin to the corresponding provisions of the Public Health (Ireland) Act, 1878, and the general nature of the relevant procedure in this jurisdiction— I am still excluding consideration of section 28 of the Act of 1934— may be gathered from the description contained in the judgment of Brett L.J. in *Reg. v. Local Government Board*[4]. The passage bearing on the part of section 257 of the English Public Health Act of 1875, which is almost word for word the same as the last part of the first paragraph of section 255 of the Irish Act of 1878, is particularly in point. It is as follows: "Now we come to s. 257. 'In all summary " 'proceedings by a local authority for the recovery of expenses " 'incurred by them in works of private improvement, the time " 'within which such proceedings may be taken shall be reckoned " 'from the date of the service of notice of demand.' Now there is the "enactment with regard to the necessity of the notice of demand, and "the question is what is the necessary inference from that enactment? "It seems to me that the necessary inference is that the notice of "demand must be given by the local board, and that until they have "given that notice of demand they are not in a position to recover "anything by way of summary process: therefore the only notice "which the local board has to give is a notice in a case where they are "empowered to recover in a summary manner expenses."

Lastly, I may refer to *In re Bettesworth and Richer*[5], where North J. states the procedure in these words: "It is quite true that the owner "cannot be compelled to pay till the total costs have been made out

1 (1881) 8 Q.B.D. 39.
2 Ibid. 43.
3 (1877) 2 Q.B.D. 389.
4 (1882) 10 Q.B.D. 309, 323-4.
5 (1888) 37 Ch.D. 535, 539.

"and apportioned between the owners, and notice has been served, "and he has had three months to dispute the apportionment, and at "the end of the three months has had written demand served upon "him."

These authorities do not all speak with the same voice, but I think the procedure to be followed, when an urban authority decides to recover street expenses directly from a frontager, may be deduced from them and the relevant legislation without undue difficulty provided two points are kept in mind. The first has already been indicated, especially by the excerpt from the judgment of Brett L.J. which I have just quoted. It is that there must be a notice of demand and that the limitation period runs from the service of that notice. And the second point is this. The limitation period does not start until there is an *enforceable* demand, that is to say, a demand duly made *after* service of the apportionment notice and *after* that apportionment, or the apportionment settled as the result of arbitration, has become binding on the frontager. Under section 250 of the Act of 1878, the six months run from the time when the matter of complaint arose and that could not happen before the frontager was bound by the apportioned figure sought to be recovered. Putting these points together, it follows that a demand for an apportioned amount made before that apportionment has become binding upon the frontager will be premature and unenforceable and incapable of starting time running; and, further, that the correct sequence of events (so far as now relevant) to found a sustainable claim is—(i) service of notice of apportionment, (ii) the expiration thereafter of three months or of such time as it takes to settle the apportionment by arbitration under section 28 of the Act of 1878, and (iii) the service of a notice of demand for payment of the apportionment then binding upon the frontager.

On that view, a demand served, as here, with the notice of apportionment cannot be regarded as an enforceable demand and the limitation period will not begin to run from it. The next question is whether section 28 of the Act of 1934 has made a difference in this respect.

That section provides for the recovery of estimated expenses. This is a marked departure from the old section 28 which only provided for the recovery of actual expenses, and I was inclined at first to the view that there had been a no less marked change in procedure and that paragraph (b) of the new section 28 contemplated an enforceable demand without the need for any previous notice of apportionment.

On consideration, however, I am satisfied that that is not the case. Paragraph (d) saves the arbitration procedure under the old section 28 and this necessarily means that the demand under paragraph (b) can only be enforceable, so as to be capable of founding a complaint, if the amount of the frontager's share has previously been determined either by the expiry of the three month period or by arbitration. I am, therefore of opinion that section 28 of the Act of 1934 has not materially affected the position and that the first demand notice of February 28, 1957, was not enforceable and was therefore not a notice from which time ran. That being so, the notice of September 23, 1958, was, in my opinion, an effective notice and the notice from which the six months' limitation period must be reckoned.

Here I should mention that Mr. Brown, for the defendant, contended that even if the first demand notice of February 28, 1957, was not a good notice for the purpose of founding proceedings, the Council was estopped or in some way precluded from setting up its invalidity. The appeal to the Ministry, which was decided in favour of the Council, was, he submitted, founded upon this very document as manifesting the "decision" of the Council upon the existence of which the jurisdiction of the Ministry depended under section 268 of the Act of 1878. I do not think there is substance in this argument. The notice of February 28, 1957, was not bad for all purposes. It undoubtedly did manifest the decision of the Council so as to permit of the appeal procedure under section 268, and it stated the amount of the defendant's apportioned share. But there is nothing in that to prevent the Council saying, as it now does, that this notice was not an enforceable demand and did not, in law, raise a matter of complaint.

For these reasons I am of opinion that the resident magistrate was correct in giving a decree for the amount claimed, and that the appeal therefore fails. But as already appears, I do not share his reasoning and I would, accordingly, answer the questions posed thus:—

(1) Yes, from the date of an enforceable demand.

(2) Yes, but the reason why the notice of February 28, 1957, was not a demand within the meaning of section 255 was not that the notice had been rendered nugatory by the presentation of the memorial referred to in the case stated.

(3) Yes.

(4) Does not arise.

I do not think an order for costs should be made against the defendant. He has been unsuccessful and has no strong case on the

merits. But the Council's notice of February 28, 1957, was gravely at fault, and its premature and mistaken demand for payment did much to promote these proceedings.

BLACK L.J.: I agree.

CURRAN L.J.: I also agree.

Appeal dismissed.

Solicitors for the defendant and appellant: *Collins & Collins.*
Solicitor for the Borough Council: *I. H. MacCormac.*

J.P.

BELFAST COLLAR COMPANY LTD. v. COMMISSIONER OF VALUATION[1]

Rating—Industrial hereditament—Two sets of premises in same occupation—Premises held under separate leases from same lessor—Premises used as factory and store respectively—Premises separated by width of public street—Premises not contiguous nor within same curtilage—Whether premises part of a single industrial hereditament—Rating and Valuation (Apportionment) Act (Northern Ireland), 1928 (18 & 19 Geo. 5, c. 30), s. 4.

An industrial concern occupied two sets of premises, a factory and a store, situated on opposite sides of the same street. Section 4(3) of the Rating and Valuation (Apportionment) Act (Northern Ireland), 1928, provides that "Where two or more properties within the same curtilage, or contiguous to "one another, are in the same occupation, and.... are used as parts of a "single.... factory, or workshop, then, for the purposes of determining "whether the several hereditaments are industrial hereditaments they shall "be treated as if they formed parts of a single hereditament comprising all "such hereditaments." The occupiers sought to have the two sets of premises treated as one for the purpose of determining whether the store was an industrial hereditament.

Held, by the Court of Appeal, that though the two sets of premises were used as parts of a single factory, they could not be treated as if they formed parts of a single hereditament for the purpose of determining whether the store was an industrial hereditament because they were neither within the same curtilage nor contiguous to one another.

CASE STATED by the Recorder of Belfast.

The Belfast Collar Co. Ltd., an industrial concern occupying two sets of premises known as Nos. 2a and 11, Shaftesbury Street, Belfast, appealed to quarter sessions against a decision of the Commissioner of Valuation refusing to treat as forming part of an industrial hereditament their premises at No 11 (hereinafter called "the subject"). The company was mainly engaged in manufacturing shirts and collars but also manufactured overalls, flannel trousers and parachutes. Its main factory was at No. 2a and the subject was situate on the opposite side of the same street, which is a public highway about twenty feet in width. The two sets of premises were held under separate leases from the same lessor. The subject premises were not used solely for storage purposes. All cloth used in the main factory was first brought to No. 11 where it was sorted, graded, examined and checked for correct width. The Recorder accepted that the examination of the cloth and, in particular, the checking for width was an essential part of the process of manufacture carried out

[1] In the Court of Appeal before Lord MacDermott L.C.J., Black and Curran L.JJ: May 19, 1959.

in the factory and found the following facts: (a) that the subject and the main factory were used as parts of a single factory; (b) that there was an essential functional connection between the subject and the main factory; (c) that the subject (assuming that it could be treated under section 4(3) of the 1928 Act as if it formed part of a single hereditament comprising the subject and the main factory) was an industrial hereditament by virtue of section 4(3) of the Act. He decided that for the purpose of determining whether the subject was an industrial hereditament the subject and the main factory could and should be treated as if they formed parts of a single hereditament comprising both such hereditaments, and allowed the company's appeal and ordered the subject to be distinguished as industrial.

On the request of the Commissioner he stated a case for the opinion of the Court of Appeal.

Lowry Q.C. and *Rowland* for the Commissioner of Valuation. There is no doubt that the main factory is an industrial hereditament but the premises known as No. 11, to which these proceedings relate, do not qualify as an industrial hereditament, and cannot be treated as forming part of a single hereditament with the main factory because they do not come within the terms of section 4(3) of the Rating and Valuation (Apportionment) Act (Northern Ireland), 1928. The subject premises cannot be described as being either contiguous to, or within the same curtilage as the main factory. In deciding that the subject and the main factory could and should be treated as if they formed part of a single hereditament comprising both such hereditaments, the learned Recorder turned his back on the express provisions of section 4(3).

"Curtilage" is generally defined as meaning a "close", "garden" or "yard." There does not appear to be any case where premises separated by a public road were held to be within the same curtilage. In fact the authorities support the contrary view: *Vestry of St. Martin-in-the-Fields v. Bird*[1]; *Pilbrow v. Vestry of St. Leonard*[2]. In *Spillers Ltd. v. Cardiff (Borough) Assessment Committee*[3] it was held that "contiguous" in section 3(3) of the equivalent English Act, should be construed as "touching" and not in its loose sense of "neighbouring." Adopting that authority there would be no merit in attributing a strict meaning to "contiguous" and a loose meaning to "curtilage."

1 [1895] 1 Q.B. 428.
2 [1895] 1 Q.B. 433, 439.
3 [1931] 2 K.B. 21, 43.

The conditions with regard to contiguity or curtilage have to be fulfilled and there is no way, in this country, of reaching the same result by a different path as the Recorder has attempted to do. The two sets of premises are held under separate leases and are separate valuation units: *Switzer & Co. v. Commissioner of Valuation*[1]. That decision governs the position here, and it is not affected by section 8 of the Valuation Acts Amendment Act (Northern Ireland), 1932, because the premises are not contiguous.

The learned Recorder based his decision on *Gilbert v. Hickinbottom & Sons, Ltd.*[2]. but it must be remembered that in England, to judge by the authorities, the view of what constitutes a single hereditament appears to be considerably less clear cut than it is under the Irish valuation law.

Harrison Q.C. and *Bowman* for the company. The fact has to be faced that these two sets of premises are properly entered as separate hereditaments in the valuation lists, but it is submitted that for de-rating purposes, as distinct from valuation, the position is different.

On the facts of this case section 4(3) comprehends a legal proposition sufficient to support the learned Recorder's judgment. Alternatively, the fact that two hereditaments have to be entered separately in the valuation lists does not preclude them from being treated as one industrial hereditament within the meaning of section 4(3) of the 1928 Act. That section is directed at the case where two or more hereditaments are used as a single factory. The curtilage which is being described is not that of one or other of the sets of premises but that of the notional factory. It is submitted that if the premises are so situated that you can "ring them round" on a map, then the conditions of the section are satisfied.

It is accepted that, following *Switzer's* case[1], in Ireland a hereditament is that which is held under one lease, but it is submitted that the definition of an "industrial hereditament" in section 4(1) of the 1928 Act goes further than the Irish concept. Parliament must be taken to have known that factories in Northern Ireland were not all of integral construction or held under one title. By reading the word "hereditament" in that subsection in the plural, the expression "industrial hereditament" can be interpreted as including a number of hereditaments. This interpretation commends itself as it would result in similar legislative provisions having the same effect here as

[1] [1902] 2 I.R. 275. [2] [1956] 2 Q.B. 40.

in England. There is nothing repugnant in the idea of one factory comprising two or more closes: *Cox v. S. Cutler & Sons, Ltd. and Hampton Court Gas Co.*[1].

LORD MACDERMOTT L.C.J. This appeal comes before the court on a case stated by the learned Recorder of Belfast at the instance of the Commissioner of Valuation. The case relates to premises known as No. 11 Shaftesbury Street, Belfast, and occupied by the Belfast Collar Company Limited, an industrial concern which also occupies other premises known as No. 2a in the same street but on the opposite side, as a shirt and collar factory and also as a factory for the making of overalls, flannel trousers and parachutes. No. 2a is the main factory and No. 11, the subject of these proceedings, is used mainly for the storage and inspection of cloth.

These two different sets of premises are held under separate leases from the same lessor and are physically divided by the public highway Shaftesbury Street—which is about twenty feet in width. There is nothing in the evidence to indicate that these separately demised premises meet in the centre of the road or under the surface. On the contrary, the indications are that they do not meet physically and Mr. Harrison, for the occupying company, agrees that they are not contiguous in any relevant sense of the word.

The occupiers appealed to the Commissioner of Valuation and from him to quarter sessions with the object of having the two sets of premises treated as one for the purpose of determining whether the subject premises were an industrial hereditament. The question for our opinion is stated thus by the learned Recorder: "The question for "the opinion of the Court is whether I was right in law in deciding "that for the purposes of determining whether the subject was an "industrial hereditament, the subject and the main factory could be "treated as if they formed parts of a single hereditament comprising "both such hereditaments." That at once indicates the opinion of the learned Recorder and the issue which this court has to consider.

I need not go into the details of the provisions in the Rating and Valuation (Apportionment) Act (Northern Ireland), 1928, for the segregation of industrial hereditaments, which are given a measure of relief, from other hereditaments. It is clear from the judgment of the learned Recorder that it was founded largely on the decision of the Court of Appeal in England in *Gilbert v. Hickinbottom & Sons, Ltd.*[2].

1 [1948] 2 All. E.R. 665. [1956] 2 Q.B. 40.

That case related to premises on either side of a public street, those on one side being a large mechanised bakery and those on the other side a repair depot used for the repair and maintenance of delivery vans and of the machinery in the bakery. It was essential that facilities for repairing the bakery plant should be readily available. The Lands Tribunal rejected the valuation officer's appeal whereby he sought to have the premises entered as two separate hereditaments, on the ground that the premises were so essential in use the one to the other that they should be treated as one hereditament.

That case is of interest because the judgments of Denning, Morris and Parker L.JJ., who constituted the court, show the various tests and considerations which have to be applied in England in deciding what constitutes a separate or single hereditament for the purposes of rating and valuation in that jurisdiction. They are set out, though not perhaps exhaustively, in the judgment of Parker L.J.[1]. It is quite clear that the geographical situation of the various components is a matter of some importance and that the degree of functional integration is a substantial factor.

In the present case the learned Recorder was satisfied, having regard to the user of the premises, that there was such an essential functional connection between the two sets of premises that they ought to be regarded and treated as one hereditament for the purpose of deciding whether No. 11 was an industrial hereditament. In his opinion they had to be treated as a unit and he so held.

The Commissioner's appeal is founded mainly on the contention (a) that, while the learned Recorder's approach might be the correct one to adopt in England, the law in Ireland as to what constitutes a hereditament is different, and (b) that the statutory requirements for treating the two hereditaments as one have not been satisfied. Here I should refer to certain of the provisions of the Rating and Valuation (Apportionment) Act (Northern Ireland), 1928. Section 4(1) says: "In this Act the expression 'industrial hereditament' means a "hereditament.... occupied and used as a mine, quarry, or mineral "railway, or, subject as hereinafter provided, as a factory or "workshop:". Section 4(3) of the same Act provides as follows: "Where two or more properties within the same curtilage, or con- "tiguous to one another, are in the same occupation, and, though "treated for any reason as two or more hereditaments for the "purposes of rating and valuation, are used as parts of a single.... "factory, or workshop, then, for the purposes of determining

[1] [1956] 2 Q.B. at 53.

"whether the several hereditaments are industrial hereditaments they "shall be treated as if they formed parts of a single hereditament "comprising all such hereditaments."

It is important to read, in connection with section 4, the definition of "hereditament" contained in section 8 of the same Act: " 'Here- " 'ditament' means a rateable hereditament as defined in section "twelve of the Valuation (Ireland) Act, 1852, and includes any "tenement requiring to be valued under the Irish Valuation "Acts,....." That definition serves to emphasise the difference between the law relating to valuation in this country and that in England where there is not the same statutory background and where the question of what constitutes a single rateable hereditament is very much more at large. The definition contained in section 12 of the 1852 Act and referred to in section 8 of the 1928 Act is in very wide terms, but in the well known case of *Switzer & Co. v. Commissioner of Valuation*[1] it was held by a divisional court of the King's Bench Division (Palles C.B., Johnson and Gibson JJ.), and affirmed by the Court of Appeal (Lord Ashbourne L.C., Fitzgibbon and Holmes L.JJ.), that premises had to be entered and valued having regard to the leases on which they were held, and that there had to be separate entries for each hereditament held on a separate lease. That decision was founded on a consideration of the provisions of the Irish Valuation code and has ever since been a basic part of the valuation law of this country.

It is true that, by section 8 of the Valuation Acts (Amendment) Act (Northern Ireland), 1932, Parliament provided a way around the decision in *Switzer's* case[1] in certain circumstances by enacting as follows: "Notwithstanding anything contained in the Irish Valuation "Acts, contiguous hereditaments in the occupation of one and the "same occupier may, if the Commissioner of Valuation thinks proper "having regard to the circumstances in any case, be valued for the "purposes of those Acts as one rateable hereditament although held "under two or more immediate lessors under different contracts of "tenancy." That section provided for, as it were, a statutory fusion of what, according to *Switzer's* case[1], would have been a series of different hereditaments. But it applied only to contiguous premises and so does not avoid the impact of *Switzer's* case[1] in the present instance. The learned Recorder, however, took the view that for the purpose of determining whether the subject was an industrial hereditament *Switzer's* case[1] should no longer be applied, and, as I

[1] [1902] 2 I.R. 275.

have indicated, he decided the case on the strength of the decision of the Court of Appeal in England in *Gilbert's* case[1].

Coming back, then, to the 1928 Act, Mr. Lowry, for the Commissioner, contends that section 4(3) is not applicable because the hereditaments are neither contiguous nor within the same curtilage. Then he goes on to say that, apart from that subsection, one cannot find any authority in section 4 or elsewhere, for treating such premises in this country as one hereditament where they are separate valuation units.

As respects section 4(3), Mr. Harrison concedes that the premises are not contiguous, but he contends that nevertheless they are within the same curtilage, and if he is right in that the case must be dealt with under that subsection. The definition of "curtilage" contained in the Shorter Oxford English Dictionary is—"A small court, yard, or "piece of ground attached to a dwelling-house and forming one "enclosure with it." The word "enclosure" is, perhaps, the key word, signifying a close or enclosure containing one, or even more than one, tenement. I cannot find, however, that these two hereditaments are within the same curtilage, divided as they are by a public highway. There is no authority to indicate that one can have a curtilage bisected in that way by a public highway. Accordingly, that being my view, and it being conceded that the premises are not contiguous, I am of opinion that section 4(3) cannot apply.

But, apart from whether section 4(3) applies, Mr. Harrison also submits that the hereditaments can be considered together having regard to the terms of section 4(1). He does not rest his argument on the decision in *Gilbert's case*[1]. He recognises and has conceded, very properly if I may say so, that *Switzer's case*[2] has become part of the law in Ireland, subject of course to any statutory modification, and that the position is completely different from that in England. What he does say is that by reading the word "hereditament" in the definition of "industrial hereditament" in section 4(1), in the plural, the expression "industrial hereditament" can be made to include a number of hereditaments. Well, the first point against that construction is that if it were well-founded section 4(3) which requires the hereditaments to be within the same curtilage or contiguous to one another, would be mere surplusage. And the second point is that it misapplies section 1 of the Interpretation Act, 1889. Under that section, no doubt, words in the singular shall include the plural, unless a contrary intention appears. But this argument, though

[1] [1956] 2 Q.B. 40.

[2] [1902] 2 I.R. 275.

ingenious, goes too far, in my opinion, to be sound. I can see no justification at all for reading "hereditament" in the plural while reading "industrial hereditament" in the singular.

In my opinion, therefore, section 4 of the 1928 Act is not applicable unless the premises come within subsection (3) and for the reasons stated earlier they cannot do so. I think that the learned Recorder went wrong in his decision by reason of the view which he took as a result of *Gilbert's* case[1], and accordingly I would answer the question posed by him for the consideration of this court in the negative.

BLACK L.J. I agree and have nothing to add.

CURRAN L.J. I also agree and have nothing to add.

Appeal allowed.

Solicitor for the appellant: *G. D. Clarke.*
Solicitors for the respondent: *J. Murland & Co.*

S.M.M.

[1] [1956] 2 Q.B. 40.

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cash to the defendant by way of deposit, and the companion then wrote out in duplicate a memorandum in the following terms: "Farm and tractor sold. 2,700 "pounds. One hundred paid." Each copy of the memorandum was signed by the three men, but the memorandum contained nothing to show who was the purchaser or who was the vendor. Of the three men the defendant alone possessed both a farm and a tractor. No agreement was made as to the date of completion of the contract, and no reference was made to the fact that a part of the farm was subject to a charge in respect of a legacy of £50, or to the fact that the tractor was subject to a hire-purchase agreement under which a sum of £255 remained outstanding; and there was no discussion as to where the defendant would live when he vacated the dwelling-house. A few days later during discussions between the plaintiff and the defendant in a solicitor's office relating to the payment of the legacy, the costs, the date for possession and the responsibility for payments of the instalments on the tractor, the defendant stated that the deal was off and he attempted to hand back the deposit. The plaintiff thereupon brought an action for specific performance of the agreement or, alternatively, for damages for breach of contract. *Held*, (i) that the circumstances leading up to the agreement were such as to raise a grave doubt as to the fairness of the transaction and that specific performance should be refused on this ground. *Conlon v. Murray* [1958] N.I. 17 applied. (ii) that the agreement was such as to be vitiated by fraud other than actual fraud, in the sense that it was one in respect of which it would be unconscientious for the plaintiff to avail himself of the legal advantages which he had thereby obtained, and that though the defendant had not asked for rescission of the contract, damages for breach of contract should be refused on this ground. *Semble* that the memorandum in this case was sufficient to satisfy the Statute of Frauds. *Quaere* whether a decree for specific performance may be made in respect of a contract for the sale of land together with chattels in the absence of special circumstances. *Buckley v. Irwin* [Ch.D. 98

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NORTHERN IRELAND—STATUTE—*Validity—"Take any property without "compensation"—Meaning of "take"—Meaning of "property"—Town and country planning restrictions on development—Injurious affection—Claim for compensation—Statutory provision excluding compensation—Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67), *s.* 3(1)—*Planning and Housing Act (Northern Ireland)*, 1931 (21 & 22 *Geo.* 5, *c.* 12), *s.* 10(2)—*Planning (Interim Development) Act (Northern Ireland)*, 1944 (7 & 8 *Geo.* 6, *c.* 3), *s.* 6(4). *Conflicts of Laws—Confiscatory or political legislation—Town and country planning restrictions—Whether confiscatory—"Take ".... property without compensation"—Validity of Act of Northern Ireland. Evidence—Minister, by—Certificate—Whether Ministry considers restriction reasonable—Appropriate evidence—Ministries of Northern Ireland Act (Northern Ireland)*, 1921, *s.* 3(1). *Town and Country Planning—Restrictions on development—Whether confiscatory.* By section 5(1) of the Government of Ireland Act, 1920: "In the exercise of their "power to make laws neither the Parliament of Southern Ireland nor the "Parliament of Northern Ireland shall "make a law so as either directly or in"directly to establish or endow any "religion, or prohibit or restrict the free "exercise thereof, or give a preference, "privilege, or advantage, or impose any "disability or disadvantage, on account "of religious belief.... or divert from "any religious denomination the fabric "of cathedral churches, or, except for the "purpose of roads, railways, lighting, "water or drainage works, or other "works of public utility upon payment "of compensation, any other property, "or take any property without com"pensation." By section 10(2) of the Planning and Housing Act (Northern Ireland), 1931: "Property shall not be "deemed to be injuriously affected by "reason of the coming into operation of "any provisions inserted in a planning "scheme, which prescribe the space about "buildings or limit the number of build"ings to be erected, or prescribe the "height or character or user of buildings ".... and which the Ministry, having "regard to the nature and situation of "the land affected by the provisions, "considers reasonable for the purpose "......" By Section 6(4) of the Planning (Interim Development) Act (Northern Ireland), 1944: "Where (*a*) an interim "development application is refused.... "then, the applicant.... shall, if he "makes a claim for the purpose be en"titled to obtain from the local authority "such compensation in respect of any "injurious affection of his property.... "as he would be entitled to obtain under "the [(Act of 1931)] if such injurious "affection had been suffered as a con"sequence of the coming into operation "of a planning scheme....." A local authority in Northern Ireland refused an interim development application under section 2 of the Act of 1944 made by a company for permission to erect factories and shops on its land. The ground of the refusal was that the height and character of the proposed buildings would not be in accordance with the requirements of the site, which was zoned as residential. Consequently, the company claimed compensation for injurious affection:—*Held*, (1) that section 6(4) of the Act of 1944 incorporated section 10(2) of the Act of 1931 (post, p. 516); (2) that the words "take any property without "compensation" in section 5(1) of the Act of 1920 were not confined to the property of religious bodies, and also that they were governed by the words "either directly or indirectly"; (3) that the rights which in the aggregate constituted ownership of property could not themselves be called "property," and so the right to use property in a particular way was not itself property; accordingly, the restrictions imposed by these Planning Acts could not be described as a purported authorisation to "take any "property without compensation" in contravention of section 5(2) of the Act of 1920 (post, pp. 517, 525); (4) that, therefore, the company was not entitled to compensation. *Held*, further, that, in order to satisfy the requirements of section 10(2) of the Act of 1931 as to proof that the Ministry considered that the restrictions imposed were reasonable, a certificate shall be issued under the Minister's seal and duly authenticated;

such a certificate, when tendered, would prove itself under section 3(1) of the Ministries of Northern Ireland Act (Northern Ireland), 1921. It was not satisfactory that oral evidence should be given by an official speaking merely on instructions without having any personal knowledge of the matter (post, pp. 522, 527). Decision of the Court of Appeal in Northern Ireland [1959] N.I. 62, reversed. *Belfast Corporation v. O. D. Cars Ltd.* [H.L. 60

PLANNING ACTS – APPEAL—*Refusal by planning authority of interim development application—Refusal upheld on appeal to Ministry of Health and Local Government—Terms of the refusal—Whether reasons given by planning authority superseded by those given by Ministry on appeal—No clear or specific limitation on the number of buildings—Whether compensation payable—Planning and Housing Act (Northern Ireland)*, 1931 (21 & 22 *Geo.* 5, *c.* 12), *s.* 10(2)—*Planning (Interim Development) Act (Northern Ireland)*, 1944 (*c.* 3) *s.* 6(4). An interim development application by the claimant for permission to develop his property by building houses was refused by the respondents as planning authority. The grounds of the refusal were, (i) that the proposed development would involve excessive expense in road widening and the provision of sewers; (ii) that in the particular circumstances the development was undesirable in the interests of road safety; (iii) that the number and density of the houses proposed would be excessive; and (iv) that the size, character and nett annual valuation of the houses would not be in accordance with the authority's requirements for the area. The claimant appealed to the Ministry of Health and Local Government but the appeal was dismissed on grounds which appeared from a letter from the Ministry to be that the proposed development would be detrimental to the amenities of the area. The appellant then sought compensation for the injurious affection of his property. At the request of the respondent the arbitrator who heard the claim stated his award in the form of a special case seeking the guidance of the court on the effect, if any, of section 10(2) of the Planning and Housing Act (Northern Ireland), 1931, and section 18 of the Roads Act (Northern Ireland), 1948, on the right to compensation. *Held*, (i) that where there has been an appeal to the Ministry the reasons given by the Ministry for refusing an interim development application supersede those given by the planning authority; (ii) that the decision of the Ministry that "the "erection of 366 houses" would entail development which would be detrimental to the "existing amenities of the area" was not a sufficiently clear or specific limitation to bring the terms of the refusal within section 10(2) of the Planning and Housing Act (Northern Ireland), 1931; (iii) that consequently it was unnecessary to decide whether the letter from the Ministry complied with the conditions necessary to constitute a valid certificate of "reasonableness"; (iv) that as there was no reference in the Ministry's decision to the problem of road safety, the question of the application of the Roads Act (Northern Ireland), 1948 did not arise. *Shillington v. Belfast Corporation.* [Q.B.D. 107

— — INTERIM DEVELOPMENT—*Change of user—Interim development application made after change of user effected—Whether application valid—Power to make order prohibiting user pending appeal from refusal of interim development application—Planning (Interim Development) Act (Northern Ireland)*, 1944 (*c.* 3) *ss.* 2, 4, 9(1). The occupier of a dwelling-house made an interim development application under the Planning (Interim Development) Act (Northern Ireland), 1944, for permission to use the premises as a shop. He had begun to use the premises as a shop before the date of application and continued to do so thereafter, and when this fact came to the knowledge of the local authority they made an order prohibiting the use of the premises as a shop, but no formal notice was sent to the occupier that his interim development application had been refused, as the local authority had at all times taken the view that no such application could be entertained in a case where the development had already been carried out. By section 2(5) of the Act of 1944 an interim development application is (subject to certain exceptions not material to this case) deemed to be refused after the lapse of two months from the receipt thereof. After the lapse of two months from the date of his application the occupier appealed to the Ministry against the local authority's refusal under the provisions of section 2(6) of the Act of 1944. The local authority took the view that there had been no valid interim development application and that accordingly the Ministry had no jurisdiction to hear the

appeal, and they therefore applied for and obtained from the Queen's Bench Division a conditional order for a writ of prohibition directed to the Ministry to prohibit the Ministry from hearing or determining the appeal. On hearing of the application to make the conditional order absolute notwithstanding cause shown the Divisional Court (Lord MacDermott L.C.J. and McVeigh J.) was divided in opinion, and accordingly the conditional order was discharged. On appeal to the Court of Appeal, *held*, (i) that in the Act of 1944 "development" by way of change of user is defined as any use of land or any building thereon for a purpose which is different from the purpose for which the land or building was last being used, and not as the making of a change in the use of the land or building; that each day's use for a new purpose was therefore "development"; and that even if an interim development application could be made only in respect of prospective development, the use of land for the new purpose in the future was such a "development" as could properly be made the subject of an interim development application; (ii) that, accordingly, in the present case the occupier's application was a valid application, and that therefore the conditional order was rightly discharged. *Held*, further, affirming the decision of the Divisional Court on this point, that in a case where a valid interim development application has been made, the interim development authority has no jurisdiction under section 4 of the Act of 1944 to prohibit the user which is the subject of the application pending the final determination of the application. *Semble* from the judgments of the members of the Divisional Court, that when an interim development authority proposes to make an order prohibiting the user of land under section 4 of the Act of 1944, the authority must explicitly resolve that they are satisfied that such an order is necessary and expedient having regard to the provisions then proposed to be included in the planning scheme, and that it is not sufficient that the authority should merely resolve to make an order under the section. *R.* (*Antrim C.C.*) *v. Ministry of Health and Local Government.* [C.A. 1

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PRACTICE—INTERROGATORIES—*Interrogatories for examination of two defendants—Bad if no indication which interrogatories each of two defendants is to answer—Delivery after action listed for trial not ground for setting aside or striking out if party being interrogated not prejudiced in the conduct of his case—Practice in England different from that obtaining in Ireland—R.C.S. Or.* 31, *rr.* 1, 7. Interrogatories for the examination of two or more defendants are bad if, when delivered, they do not have a note at the foot stating which of such interrogatories each of the defendants is required to answer. Interrogatories will not be set aside or struck out under Order 31, rule 7 merely on the ground that the application to deliver them is not made until after the action is listed for trial. Observations by Black L.J. on the difference between the present practice in England with regard to applications for leave to deliver interrogatories and the practice obtaining in Ireland. *McClatchey v. Reilly and Ulster Bank Ltd.* [Q.B.D. 118

——JUDGMENT—*Judgment in default of appearance—Hire purchase company claiming arrears of instalments and the return of a car or its value—Severance of claims—Right to enter judgment by default for the liquidated amount—R.S.C. Or.* 13, *rr.* 7, 8. *Mercantile Credit Co. v. Mann* (*Practice Note*) [Q.B.D. 96

——PLEADING—*Action for damages for personal injuries—Osteo-arthritis. McKay v. McClure* (*Practice Note*) [Q.B.D. 34

——SETTLEMENT—*Application to have consent settling an action made a rule of court—Whether consent on behalf of Ministry properly executed—Ministries of Northern Ireland Act* (*Northern Ireland*), 1921 (12 *Geo.* 5, *c.* 6), *ss.* 2, 3. *Cunningham v. Winton* (*Practice Note*) [Q.B.D. 97

——THIRD PARTY—*Whether prima facie case shown against third party—Third party the manufacturer of goods alleged by plaintiff to have caused his injury—R.S.C. Or.* 16, *r.* 52. The plaintiff injured his eye with a needle while he was engaged in stitching mattresses for his employers, the defendants, and he alleged that his injury was caused by the snapping of twine supplied to him by the defendants for his work. The defendants, having issued a third party notice against

the manufacturers of the twine, made an application for third party directions grounded upon an affidavit which set out the claim made by the plaintiff, deposed to the fact that the third party had supplied the twine to them, and showed that they could not have examined the twine prior to its use by the plaintiff. *Held*, that the defendants had made out a sufficient prima facie case against the third party to warrant third party directions. *Fox v. Armagh Education Authority* [1956] N.I. 171 explained. *Andrews v. Dunn & Co. Ltd.: Belfast Ropework Co. Ltd. (Third party)*
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PUBLIC HEALTH—PRIVATE IMPROVEMENT EXPENSES—*Demand for payment of share of estimated cost of works served on owner with notice of apportionment—Whether valid demand—Further demand served after expiry of time for appeal against apportionment—Proceedings for recovery of sum demanded brought within six months of second demand—Whether proceedings out of time—Public Health (Ireland) Act*, 1878 (41 & 42 *Vict. c.* 52), *ss.* 28, 250, 255, 268—*Local Government Act (Northern Ireland)*, 1934 (24 & 25 *Geo.* 5, *c.* 22), *s.* 28. The defendant was the owner of premises abutting on a private street and he and other frontagers on the street were served by the borough council with a notice (hereinafter referred to as the "works notice") requiring them to make up the street. These works notices not having been complied with the borough council, acting under the provisions of section 28 of the Public Health Act (Ireland), 1878, as amended by section 28 of the Local Government Act (Northern Ireland), 1934, served on the frontagers on February 28, 1957, a document (hereinafter referred to as the "first demand notice") setting out the estimated cost of the works, the amount apportioned on each frontager in respect of his premises, and coupled with a demand for the payment of such apportioned sum within one month. By section 28 of the Act of 1878 an owner may take the question of his proportion of the cost to arbitration, and by section 255 of that Act he has three months from the service of the demand notice in which to exercise this right, otherwise the apportionment becomes binding and conclusive upon him. By section 268 of the Act of 1878 an owner has the right to appeal to the Ministry of Health and Local Government against the works notice and by that section he has three weeks from the service of the demand notice in which to lodge his appeal. Certain frontagers other than the defendant forthwith appealed to the Ministry against the works notice and this appeal was dismissed on August 20, 1958. The defendant took steps to contest either the works notice or the first demand notice. By sections 250 and 255 of the Act of 1878 summary proceedings for the recovery of expenses under the Act must be commenced within six months reckoned from the date of service of the demand notice. The borough council took no steps against the defendant pending the determination of the appeal by the other frontagers and after the dismissal of that appeal, taking the view that any proceedings against the defendant on the first demand notice were out of time, they served a second demand notice on the defendant on September 23, 1958, and commenced proceedings by summons on December 9, 1958, for the recovery of the amount of the demand. It was contended by the defendant, firstly, that the first demand notice was a valid document and proceedings thereon were statute barred; and, secondly, that in any event the borough council was precluded from denying the validity of that demand. It was contended for the borough council that the first demand notice was a nullity and that the only relevant demand was that in the second demand notice. *Held*, (i) that the first demand notice was invalid by reason of the fact that it had been served before the time for taking the apportionment to arbitration had elapsed; (ii) that the borough council was not precluded from denying the validity of the first demand notice; (iii) that, accordingly, the second demand notice was a valid demand, and the proceedings commenced within six months of that demand were validly brought. *Semble* that an appeal by frontagers other than the defendant would not have rendered nugatory a valid demand served on the defendant. *Portadown B.C. v. Moore.* [C.A. 185

——TOWNS IMPROVEMENT—*Demolition of dangerous buildings—Recovery of expenses from owner—Whether agent receiving rents liable as an owner—Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34), *ss.* 3, 75, 76—*Towns Improvement (Ireland) Act*, 1854 (17 & 18 *Vict. c.* 103), *s.* 39. Section 75 of the Towns Improvement Clauses Act, 1847, as incorporated by section 39 of the Towns Improvement (Ireland) Act, 1854, en-

ables the urban district council of a town to which the Act of 1854 applies to obtain an order at petty sessions requiring the owner of dangerous or ruinous buildings to take down or secure such buildings, and on failure of the owner to comply with such order empowers the council to execute the required works at the expense of the owner, and section 76 of the Act provides for the recovery of such expenses by means of a justice's warrant. By section 3 of the Act the term "owner" in relation to land or buildings is defined as "the person for "the time being entitled to receive.... "the rack rent from the occupier or "occupiers thereof." *Held*, by the Court of Appeal that the words "the person "entitled to receive the rack rent" refer only to a person entitled to receive rent in his own right and not to a person receiving the rent as an agent, and accordingly that a solicitor collecting rents of premises in respect of which orders had been made under section 75 of the Act was not liable to pay to the council the cost of works executed by the council upon failure to comply with the orders. *Newry U.D.C. v. Collins.* [C.A. 54

RATING—EXEMPTION—"CHURCH "HALL" 141
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——INDUSTRIAL HEREDITAMENT—*Two sets of premises in same occupation—Premises held under separate leases from same lessor—Premises used as factory and store respectively—Premises separated by width of public street—Premises not contiguous nor within same curtilage—Whether premises part of a single industrial hereditament—Rating and Valuation (Apportionment) Act (Northern Ireland)*, 1928 (18 & 19 *Geo.* 5, *c.* 30), *s.* 4. An industrial concern occupied two sets of premises, a factory and a store, situated on opposite sides of the same street. Section 4(3) of the Rating and Valuation (Apportionment) Act (Northern Ireland), 1928, provides that "Where two or more properties within "the same curtilage, or contiguous to "one another, are in the same occupation, "and.... are used as parts of a single ".... factory, or workshop, then, for "the purposes of determining whether "the several hereditaments are industrial "hereditaments they shall be treated as if "they formed parts of a single heredita-"ment comprising all such heredita-"ments." The occupiers sought to have the two sets of premises treated as one for the purpose of determining whether the store was an industrial hereditament. *Held*, by the Court of Appeal, that though the two sets of premises were used as parts of a single factory, they could not be treated as if they formed parts of a single hereditament for the purpose of determining whether the store was an industrial hereditament because they were neither within the same curtilage nor contiguous to one another. *Belfast Collar Co. Ltd. v. Commissioner of Valuation.* [C.A. 198

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——Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103), s. 39. 54
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——Matrimonial Causes and Marriage Laws (Ireland) Act, 1870 (33 & 34 Vict. c. 110), ss. 7, 13. 122
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VALUATION—RATING—*Exemption—"Church hall, chapel hall or similar "building"—Building used by university students of a particular religious denomination for recreational and social purposes—Whether entitled to exemption—Rating and Valuation (Amendment) Act (Northern Ireland)*, 1956 (5 *Eliz.* 2, *c.* 23), *s.* 1. Section 1(1) of the Rating and Valuation (Amendment) Act (Northern Ireland), 1956, provides that the Commissioner of Valuation shall distinguish as exempt any hereditament consisting of "a church "hall, chapel hall or similar building "held by a religious body, so long as "that hall or building is used mainly or "exclusively for purposes connected "with that body." The appellants were the trustees of a fund known as "The "Catholic Men's Hostel (Q.U.B.) Fund" and were the occupiers of a hereditament situate close to Queen's University, Belfast, and known as "the Catholic "Chaplaincy." The hereditament comprised an assembly room, lecture and committee rooms, a library and a canteen, and there was also certain residential accommodation occupied by the Roman Catholic Dean of Residences at the University. The Chaplaincy was open daily and was used for social and recreational purposes by Roman Catholic graduates and undergraduates of the University, and meetings of certain Roman Catholic religious societies connected with the University were held there. The building also contained a chapel and sacristy in which religious services were held regularly on weekdays but not on Sundays. The chapel and sacristy had been distinguished as exempt in the valuation lists, but the appellants contended that the remainder

of the building was also entitled to exemption. On appeal from the Commissioner, the Recorder of Belfast held that although certain activities of a religious character took place in the hereditament the main purpose for which it was used was a kind of social club with a religious atmosphere and therefore that the user thereof was not similar to that of a church hall or chapel hall so as to attract exemption under the Act of 1956. *Held*, by the Court of Appeal (Curran L.J. dissenting), that the hereditament was a "church hall, chapel "hall or similar building" and accordingly entitled to exemption. Per Lord MacDermott L.C.J.: To constitute a "church hall, chapel hall or similar "building" the building in question must be used to further the work or meet the needs of a group or community of worshippers, which group or community may be a congregation or a more loosely knit body such as members of a university or a garrison having a common religious faith. If a building is so used, it is immaterial that the activities carried on in it are merely ancillary to the advancement of religion. Per Black L.J.: A hereditament will not necessarily cease to be a "church hall" within the meaning of section 1(1) of the Act of 1956 merely because in addition to being used for religious meetings it is also used for social and recreational purposes designed to further the work of the religious body by which it is held. The main conception in the phrase "similar "building" in that section is that of a building used by a religious body in a manner in which a church hall or chapel hall would be used and serving purposes which a church hall or chapel hall would serve; whether a building is a "similar "building" in that sense is a question of fact, but the evidence in the present case is such as to justify the court in reaching a conclusion different from that reached below. Per Curran L.J.: A "similar "building," to come within section 1(1) of the Act of 1956, must be ancillary to a place of worship, and unless it is so, the question as to its user does not arise. *Magecan and others v. Commissioner of Valuation.* [C.A. 141

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